TANJUNG LANGSAT PORT SDN BHD v. TRAFIGURA PTE LTD & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[ORIGINATING SUMMONS NO: 24NCC(ARB)-13-03-2014 & 24NCC(ARB)-18-04-2014]
31 JANUARY 2016

ARBITRATION: *Award – Setting aside – Application to set aside partial award granted by majority tribunal of arbitration – Whether majority tribunal acted in excess of jurisdiction – Whether decision involved 'new difference' – Whether application amounted to challenging decision on effect of agreements under guise – Whether permissible in law – Arbitration Act 2005, s. 37*

ARBITRATION: *Award – Setting aside – Reliance on novation and rescission to set aside award – Failure to raise novation and rescission during arbitration proceeding – Whether plaintiff could raise novation and rescission in present application – Arbitration Act 2005, s. 37*

ARBITRATION: *Award – Setting aside – Grounds to set aside – Breach of rules of natural justice – Whether breaches would ipso facto mean that arbitral award would be in conflict with public policy – Whether breach of natural justice caused actual prejudice – Failure to give reasons for decision – Whether formed valid ground for setting aside – Arbitration Act 2005, s. 37*

The plaintiff ('TLP') applied to set aside the partial award granted in favour of the defendant ('Trafigura') *via* encl. 1, whilst encl. 8 was TLP's application to set aside the *ex parte* order obtained by Trafigura for leave to enforce the partial award. TLP, a private limited company incorporated in Malaysia, was engaged in the business of petroleum and chemical cargo handling. TLP was also engaged in storage as well as managing port activities and development of Tanjung Langsat Industrial Estate. Trafigura was engaged in the trading of crude oil and petroleum products ('product') in the Far East with its place of business in Singapore. TLP and Trafigura executed a deed of commitments, wherein, TLP was obliged to, *inter alia*: (i) construct a tank terminal with all necessary equipment, containing eight storage tanks, for the provision of the storage service as defined in the deed of commitments ('facility'); and (ii) upon completion of the construction of the facility, enter into a storage agreement to lease the facility exclusively to Trafigura. TLP's primary obligation under the storage agreement was to provide storage service for at least seven years and it was also a common ground that the facility would be operated by TLP during the storage agreement, thereby making TLP the bailee of Trafigura's product stored in the facility. However, it was subsequently discovered that the internal floating roofs ('IFR') in storage tanks 1 and 5 of the facility were damaged. The IFR served the purpose of minimising product loss through evaporation, and preventing

large quantities of flammable vapour from accumulating in the tanks. The damage to the IFR was a result of a failure and/or defect in the design/or construction of the facility. Pursuant to a meeting held a day after the discovery of the defective IFR, it was agreed that TLP would take immediate remedial steps and/or safety precautions to address any safety concerns, including inert gas blanketing of the ullage space of the affected tanks. It was Trafigura's case that it continued with normal cargo operations at the facility relying on representations from TLP that the facility was safe. A fire and explosion broke out at tank 1 and subsequently spread to tank 2 ('fire incident'). The fire incident destroyed tanks 1 and 2 and Trafigura's products stored therein.

Trafigura commenced an arbitration proceeding against TLP seeking: (i) the value of the product stored in tanks 1 and 2 destroyed in the fire incident; (ii) the costs, fees and expenses incurred by TLP as a result of the fire incident and the shut-down of the facility after the fire incident; (iii) a partial refund of the advance storage fee paid to TLP; and (iv) damages for loss of use of the facility for the minimum lifespan of the storage agreement, being a period of seven years. The arbitration, by majority ('the Majority Tribunal'), found in favour of Trafigura that: (a) one or more defects in the design and/or construction of the facility was the effective and proximate cause of the fire incident; (b) the defective design/construction of the facility was due to a breach by TLP of the deed of commitments; and (c) TLP's liability for breach of the deed of commitments was not limited or excluded by the provisions of the storage agreement. The majority tribunal awarded damages to Trafigura for (i) loss of use of the facility for the minimum lifespan of the storage agreement, being a period of seven years ('loss of use of facility damages'); (ii) value of the Trafigura's products that were destroyed in the fire incident ('product value'); (iii) additional costs, fees, and expenses that Trafigura had incurred as a result of the fire incident ('incidental costs'); and (iv) refund of the excess advance storage fee payment paid by Trafigura to TLP ('advance storage fee') (hereinafter collectively referred to as partial award). TLP applied under s. 37 of the Arbitration Act 2005 ('the Act') to set aside the partial award on, amongst others, three main grounds: (i) the partial award contravened s. 30(2) and (5) and s. 37(1)(a)(iv) and (v) of the Act *ie*, that the majority tribunal had exceeded their jurisdiction; (ii) a breach of the rules of natural justice; and (ii) the partial award was in conflict with the public policy of Malaysia. In its first complaint, TLP argued that the majority tribunal erred in jurisdiction by applying the wrong contract *ie*, the deed of commitments as the relevant contract to determine TLP's liability for the fire incident. TLP argued that the majority tribunal had failed to consider the relevant clauses of the two agreements, namely, cl. 4.3 of the deed of commitments and cl. 32 of the storage agreement and the substitution or replacement of one with the other. TLP submitted that on a plain reading of the said clauses, 'it can only have one meaning *ie*, that the storage agreement had replaced the deed of

commitments'. In addition, TLP argued that the majority tribunal had wrongly accepted Trafigura's submission that a term of fitness was implied into the deed of commitments because (i) it was expressly set out in cl. 16.5 of the storage agreement; and (ii) the deed of commitments was already substituted by the storage agreement. TLP's second complaint was that the majority tribunal had conflated or inter-mixed the deed of commitments and the storage agreement and the reliefs that could be granted from the breach of the agreements. In essence, TLP argued that the majority tribunal had exceeded its jurisdiction by awarding Trafigura for loss of use of the facility under the storage agreement without first finding a breach of the storage agreement.

Held (dismissing plaintiff's applications in encl. 1 and encl. 8 with costs):

(1) The court should be slow in interfering with an arbitral award, which award can only be set aside under the limited circumstances prescribed by s. 37 of the Act. A setting aside proceeding must never be in the nature of an appeal *ie*, to guard against the danger of assuming the role of an appellate court. (para 9)

(2) The majority tribunal did not act in excess of jurisdiction in deciding that the relevant contract to determine liability for the fire incident was the deed of commitments as it was an issue that was within the scope of submission to the majority tribunal and the latter's decision did not involve a 'new difference'. The majority tribunal did not commit an 'error of jurisdiction' as it had considered and addressed TLP's first complaint. (paras 23 & 24)

(3) The majority tribunal had also considered and rejected TLP's argument in respect of the effect of cl. 4.3 of the deed of commitments and cl. 32 of the storage agreement. This was a finding of fact of the majority tribunal going to the merits of the case that notwithstanding these provisions, the deed of commitments was the relevant contract to determine liability for the fire incident. By seeking to re-open the merits of the majority tribunal's decision, the plaintiff was challenging the majority tribunal's decision of the effect of cl. 4.3 of the deed of commitments and cl. 32 of the storage agreement under the guise of a challenge for excess of jurisdiction which is not permissible in law. Hence, the first complaint of the plaintiff could not be sustained. (para 25)

(4) The plaintiff had recharacterised its case and sought to argue that the deed of commitments was novated or rescinded when the parties entered into the storage agreement. However, such a course of action was no longer open to the plaintiff having had every opportunity to ventilate such an argument in the Arbitration but never did so. (para 25)

(5) Rescission or novation applies to executory contracts or executed contracts under which one party still has an outstanding obligation. The deed of commitments in the instant case had been performed when it came to an end *ie*, 'ceased to be of further force and effect'. Further, there was nothing in the language of the deed of commitments or the storage agreement suggesting that the former was rescinded or novated once the parties entered into the storage agreement. Therefore, the majority tribunal had correctly made the findings in the partial award. (para 25)

(6) There was a mischaracterisation of both TLP's claims in the arbitration and the majority tribunal's award of damages in the partial award. Both Trafigura's primary claim and the majority tribunal's award of damages including damages for loss of use of the facility were raised and given under the deed of commitments. This put paid to TLP's argument that the award for loss of use of the facility was for 'TLP's failure to fulfil its obligations under the storage agreement to provide storage services for seven years'. Accordingly, it followed that there was no issue whether 'in order therefore to award damages for the failure to provide storage services for seven years, the majority tribunal had to find that TLP breached the storage agreement', given that this was neither Trafigura's claim nor the majority tribunal's award of damages. (para 29)

(7) One of the losses claimed by Trafigura was the loss of the use of facility for the period from the date of the fire incident until the date of expiry of the initial seven-year term of the storage agreement. After 'having considered carefully all of the submissions of both parties', the tribunal found 'the claimant's business model centres on the blending and trading of gasoline. Pursuant to the deed of commitments and the storage agreement, the claimant contractually bargained for and had the legitimate expectation that it would have use of the storage capacity at the facility for a period of at least seven years.' The finding of the majority tribunal accords with the factual matrix of the case. (paras 32-34)

(8) There can be no award of damages under a contract without first being found a breach of the contract. TLP's second complaint, that the majority tribunal had 'conflated and intermixed the two agreements', could not be sustained. Even if it can be argued that the expectation arose only under the storage agreement, it did not mean that the majority tribunal had 'conflated or intermixed the two agreements'. There was nothing improper with the majority tribunal awarding damages under the deed of commitments for Trafigura's loss of use of the facility with reference to Trafigura's expectation under the storage agreement to use the facility for the minimum period of seven years. (paras 36 & 37)

(9) TLP's arguments that the majority tribunal had contravened s. 30(2) and (5) of the Act could not be sustained. Section 30(2) of the Act requires the arbitral tribunal to apply the chosen law of the parties as its governing law whilst s. 30(5) of the Act requires the arbitral tribunal to decide in accordance with the terms of the agreement and shall take into account the usages of the trade applicable to the transaction. The sections are not independent grounds on which the arbitral award may be set aside; the reason being the grounds for setting aside an arbitral award are limited to those found in s. 37 of the Act. (paras 39 & 43)

(10) The tribunal found liability under the deed of commitments and not the storage agreement. Therefore, TLP's submission that the partial award must be set aside, and likewise the order for leave to enforce the partial award, on the ground of the tribunal's failure to consider TLP's defence of the limitation of liability cl. 13.4 of the storage agreement could not be sustained because it was an issue that need not be considered by the tribunal. There was no similar cl. 13.2 appearing in the deed of commitments. (para 49)

(11) It is undisputed under s. 37(1)(b) read with s. 37(2)(b)(i) and (ii) of the Act, that a breach of the rules of natural justice which constitutes a ground of setting aside an award is expressed as one where the award is in conflict with the public policy of Malaysia. Not all breaches of the rules of natural justice will *ipso facto* mean that the arbitral award will be in conflict with public policy and will be liable to be set aside under s. 37(1)(b)(ii) of the Act. Even if it can be shown that there has been a breach of natural justice, the court retains the discretion whether to set aside the arbitral award for being in conflict with public policy under s. 37(1)(b)(ii) of the Act. In order to set the arbitral award for being in conflict with public policy, it must be shown that the alleged breach of natural justice has caused actual prejudice to the aggrieved party. (paras 58, 63 & 71)

(12) There was no need for the majority tribunal to consider TLP's defence that its liability to pay damages for breach of its obligations under the storage agreement was limited by cl. 13.4 of the storage agreement. The majority tribunal had considered and decided on all central issues in the arbitration including the central defences raised by TLP. Even if it could be argued that the majority tribunal did not comply with the rules of natural justice in failing to consider TLP's defence under cl. 13.4 of the storage agreement, this was not a breach which has caused actual prejudice or 'shock the conscience' or offends 'fundamental principles of justice and morality'. (paras 74, 75 & 77)

(13) The duty to give reasons is not part of the rules of natural justice and therefore, it was not a ground on which an arbitral award may be set aside under s. 37(1)(b)(ii) read with s. 37(2)(b) of the Act. The exceptions for the non-giving of reasons for an award in s. 33(3)(a) or (b) of the Act did not apply in the present case. In any event, the partial award 'taken as a whole', more than adequately 'informs the parties of the bases on which the majority tribunal reached its decision' on the award of damages for Trafigura's loss of use of the facility. Hence, there was no basis to say that the majority tribunal has breached its obligation to give reasons and which warranted the award to be set aside under ss. 37(1)(b)(ii), 37(2)(b)(ii) and 39(1)(b)(ii) of the Act, on the ground that the partial award is in conflict with the public policy of Malaysia. (para 87)

(14) The majority tribunal did not breach the rules of natural justice in awarding damages to Trafigura for product value and incident cost. The majority tribunal considered and dismissed TLP's argument that the chain of causation had been broken by 'TLP's operational errors'. Further, TLP had never seriously pursued the argument that its own operational errors broke the chain of causation in the arbitration proceedings. In any event, TLP's argument that its own operational errors broke the chain of causation was unsustainable in law because the chain of causation can only be broken by some event extraneous to its own conduct. TLP cannot take advantage of its own wrongdoing. (paras 90 & 93)

Case(s) referred to:

AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal [2013] 2 CLJ 395 CA ***(refd)***

Aloe Vera of America Inc v. Asianic (S) Pte Ltd And Another [2006] 3 SLR 174 ***(refd)***

Attorney General Of Belize And Others v. Belize Telecom Ltd And Another [2009] 1 WLR 1988 ***(refd)***

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***

Bank Utama (Malaysia) Bhd v. Insan Budi Sdn Bhd [2009] 1 CLJ 221 CA ***(refd)***

BCM Development Sdn Bhd v. The Titular Roman Catholic Bishop of Malacca Johore [2010] 8 CLJ 920 CA ***(refd)***

BLC And Others v. BLB And Another [2014] 4 SLR 79 ***(refd)***

Cairn Energy India Pty Ltd & Anor v. The Government of India [2010] 2 CLJ 420 CA ***(refd)***

Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd (No 2) [2012] FCA 1214 ***(dist)***

Chain Cycle Sdn Bhd v. Government of Malaysia [2014] 10 CLJ 196 HC ***(refd)***

CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33 ***(refd)***

Downer-Hill Joint Venture v. Government of Fiji [2005] 1 NZLR 554 ***(refd)***

Gas Authority of India Ltd v. Bhagheertha Engg Ltd 2002 (Supp) Arb LR 593(Del) ***(refd)***

Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd [2008] 6 CLJ 31 CA ***(refd)***

A *Hebei Import & Export Corp v. Polytek Engineering Co Ltd (1999) 2 HKCFAR 111* ***(refd)***
Hj Ali Hj Othman v. Telekom Malaysia Bhd [2003] 3 CLJ 310 CA ***(refd)***
Infineon Technologies (M) Sdn Bhd v. Orisoft Technology Sdn Bhd & Another Case [2010] 1 LNS 889 HC ***(refd)***
Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd [2004] 1 CLJ 743 FC ***(refd)***
Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896
B ***(refd)***
Ironsands Investments Ltd v. Toward Industries Ltd (CIV-2010-404-004879) ***(refd)***
Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617 CA ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(dist)***
Lesotho Highlands Development Authority v. Impregilo SpA [2006] 1 AC 221 ***(refd)***
Lynch v. Thorne [1956] 1 All ER 744 ***(refd)***
C *Mark John Jerling v. Moss Brothers Limited [2013] NZHC 2893* ***(dist)***
Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd [2005] 2 CLJ 596 CA ***(refd)***
MS Som Datt Builders Ltd v. State of Kerala 2009 (4) RAJ 304 ***(dist)***
MTM Millenium Holdings Sdn Bhd v. Pasukhas Construction Sdn Bhd & Anor [2013] 1 LNS 1325 CA ***(refd)***
D *Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd [2003] 4 CLJ 294 CA* ***(refd)***
Official Assignee v. Chartered Industries of Singapore Ltd [1978] 1 LNS 134 HC ***(dist)***
Oil and Natural Gas Corporation Limited v. Saw Pipes Ltd AIR 2003 SC 2629 ***(refd)***
Oil Basins Limited v. BHP Billiton Ltd & Ors [2007] VSCA 225 ***(refd)***
Polygram Records Sdn Bhd v. Hillary Ang & Ors (Collectively Known As "The Search") & Anor [1994] 3 CLJ 806 HC ***(dist)***
E *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA [2007] 1 SLR 597* ***(refd)***
Rajasthan State Mines & Minerals Limited v. Eastern Enginerring Enterprises & Anor AIR 1999 SC 3627 ***(not foll)***
Ramli Shahdan & Anor v. Motor Insurers' Bureau of West Malaysia & Anor [2006] 1 CLJ 224 CA ***(refd)***
Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd [2005] 3 CLJ 259 CA
F ***(refd)***
Soeximex Sas v. Agrocorp International Pte Ltd [2012] 1 Lloyd's Rep 52 ***(dist)***
Soh Beng Tee & Co Pte Ltd v. Fair Mount Development Pte Ltd [2007] 3 SLR 86 ***(refd)***
Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor and Another Appeal [1998] 3 CLJ 85 CA ***(refd)***
TCL Air Conditioner (Zhongshan) Co Ltd v. Castel Electronics Pty Ltd [2014] FCAFC
G *83* ***(refd)***
Thai-Lao Lignite Co Ltd & Anor v. Government of the Lao People's Democratic Republic [2014] 1 LNS 525 CA ***(refd)***
The Central Bank of India, Ltd Amritsar v. The Hartford Fire Insurance Co Ltd, AIR 1965 SC 1288 ***(refd)***
The Government of India v. Cairn Energy India Pty Ltd & Ors [2013] 1 LNS 1328 ***(refd)***
H *The Government of India v. Cairn Energy India Pty Limited & Ors (Civil Appeal No. W-02(NCC)(A)-2404-10-2012) (Unreported)* ***(refd)***
Thong Ah Fat v. PP [2012] 1 SLR 676 ***(refd)***
TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd [2013] SGHC 186 ***(foll)***
World Trade Corporation v. C Czarnikow Sugar Ltd [2005] 1 Lloyd's Rep 422 ***(refd)***
I

Legislation referred to:

Arbitration Act 2005, ss. 20, 30(2), (5), 33(3)(a), (b), 36, 37(1)(a)(iv), (v), (b)(ii), (2)(b)(i), (ii), 39(1)(a)(iv), (v), (b)(ii)
Contracts Act 1950, s. 63
United Nations Commission on International Trade Law Arbitration Rules, arts. 17(1), 34(3)

Arbitration Act (Cap 10) [Sing], s. 48(1)(a)(vii)
Arbitration Act 1996 [UK], s. 68(2)(b)
International Arbitration Act 1974 [Aus], ss. 6, 16, 19
The Arbitration And Conciliation Act 1996 [Ind], ss. 28(1)(a), (b)(i), (2), (3), 34(2)(b)(ii)

Other source(s) referred to:

Chitty on Contracts, 31st edn, 2012, paras 12-043, 22-025, 22-031
MacGillivray on Insurance Law, 10th edn, p 584, paras 22-39
OP Malhotra & Indu Malhotra, *The Law and Practice of Arbitration and Conciliation*, edn I, p. 909, paras 14-28
Pollock & Mulla's Indian Contract & Specific Relief Acts, 13th edn 2006, pp 1227-1228

(Originating Summons 24NCC(ARB)-13-03-2014)
For the plaintiff - Cyrus Das (Lam Ko Luen & Lee Lyn Ni with him); M/s Shook Lin & Bok
For the defendant - Tommy Thomas (Jainil Bhandari, Michael Yap & Christina Ang with him); M/s Christopher & Lee Ong

(Originating Summons 24NCC(ARB)-18-04-2014)
For the plaintiff - Tommy Thomas (Jainil Bhandari, Michael Yap & Christina Ang with him); M/s Christopher & Lee Ong
For the defendant - Nitin Nadkarni (Crystal Wong with him); M/s Lee Hishammuddin Allen & Gledhill

Reported by S Barathi

JUDGMENT

Lau Bee Lan J:

[1] There are two applications before the court which were heard together. Enclosure 1 in 24NCC(ARB)-13-03-2014 ('OS 13') is the plaintiff, Tanjung Langsat Port Sdn Bhd's ('TLP') application dated 14 March 2014 to set aside the partial award dated 23 December 2013 granted in favour of the defendant, Trafigura Pte Ltd ('Trafigura'). Enclosure 8 in 24NCC(ARB)-18-04-2014 ('OS18') is TLP's application dated 2 May 2014 to set aside the *ex parte* order dated 5 May 2014 obtained by Trafigura for leave to enforce the partial award.

[2] The brief background facts relevant to TLP's application are these.

(a) TLP, is a private limited company incorporated in Malaysia and is engaged in the business of petroleum and chemical cargo handling and storage as well as managing port activities and development of Tanjung

Langsat Industrial Estate. Trafigura Pte Ltd ('Trafigura'), is engaged in the trading of crude oil and petroleum products ('product') in the Far East with its place of business in Singapore;

(b) By a deed of commitments dated 10 May 2005 entered between TLP and Trafigura, TLP was obliged to, *inter alia*: (a) construct a tank terminal with all necessary equipment, containing eight storage tanks, for the provision of the storage service as defined in the deed of commitments ('facility'), and (b) upon completion of the construction of the facility, enter into a storage agreement to lease the facility exclusively to Trafigura (see partial award, paras. 63 and 64);

(c) The storage agreement was signed on 1 June 2008 by TLP and Trafigura. It is common ground between the parties, and the arbitral tribunal found as a fact, that TLP's primary obligation under the storage agreement was to provide storage service for at least seven years (see partial award, paras. 63, 69, 276 and 322). It was also common ground that the facility would be operated by TLP during the storage agreement, thereby making TLP the bailee of Trafigura's product stored in the facility. In addition, Trafigura may also from time to time, give written instructions to TLP concerning the operation of Trafigura's product stored in the facility and TLP shall carry out those instructions. The facility became operational in June 2008 (see partial award, para. 71);

(d) On or about 16 July 2008, it was discovered that the internal floating roofs ('IFR') in storage tanks 1 and 5 of the facility were damaged. The IFR served the purpose of minimising product loss through evaporation, and preventing large quantities of flammable vapour from accumulating in the tanks (see partial award, paras. 70 to 71). The damage to the IFR was a result of a failure and/or defect in the design/or construction of the facility (see partial award, para. 122);

(e) On 17 July 2008, a day after the discovery of the defective IFR, a midnight meeting was held and the attendees agreed that TLP would take immediate remedial steps and/or safety precautions to address any safety concerns, including inert gas blanketing of the ullage space of the affected tanks (see partial award, paras. 72 and 73);

(f) It was Trafigura's case that it continued with normal cargo operations at the facility relying on representations from TLP that the facility was safe (see partial award, para. 75). Nevertheless, the tribunal found that by continuing operations at the facility after the midnight meeting, Trafigura did not cause or contribute to the fire incident (see partial award, para. 136). At para. 151 of the partial award, the tribunal also found that:

(i) If tank 1 had been properly inerted by TLP, there would have been no risk of fire or explosion; and

(ii) TLP's efforts to inert tank 1 were inadequate.

(g) On 17 August 2008, a fire and explosion broke out at tank 1. On 18 August 2008, the fire spread to tank 2 ('fire incident'). The fire incident destroyed tanks 1 and 2 and Trafigura's product stored therein (see partial award, para. 76).

(h) Trafigura commenced an arbitration against TLP seeking:

(i) The value of the product stored in tanks 1 and 2 and destroyed in the fire incident;

(ii) The costs, fees and expenses incurred by TLP as a result of the fire incident and the shut-down of the facility after the fire incident;

(iii) A partial refund of the advance storage fee paid to TLP; and

(iv) Damages for loss of use of the facility for the minimum lifespan of the storage agreement, being a period of seven years up until 31 May 2015.

(partial award, para. 90).

TLP raised, amongst others, the following defences:

(i) The operative agreement that governs the rights and obligations of the parties over the fire incident claim is the storage agreement and not the deed of commitments;

(ii) Clause 13.2 of the storage agreement provides that Trafigura had agreed to bear the risk of damage by fire to the product and to insure itself against such loss; and

(iii) Clause 13.4 of the storage agreement limits the damages payable and hence, TLP's liabilities to Trafigura is US1,000,000.

(i) By a majority of 2:1 (Tan Sri Dato' Abdul Aziz bin Mohamad dissenting), Dr Michael J Moser and Professor Michael Pryles ('majority tribunal'), found ('majority award') that:

(i) One or more defects in the design and/or construction of the facility was the effective and proximate cause of the fire incident (see partial award, paras. 136-152).

(ii) This defective design/construction of the facility was due to a breach by TLP of the deed of commitments (see partial award, paras. 188-227).

(iii) TLP's liability for breach of the deed of commitments was not limited or excluded by the provisions of the storage agreement (see partial award, paras. 229-234).

(j) The majority tribunal awarded the following sums to Trafigura:

(i) US$118,374,250, being damages for Trafigura's loss of use of the facility for the minimum lifespan of the storage agreement, being a period of seven years up until 31 May 2015 ('loss of use of facility damages');

(ii) US$20,747,275.20, being the value of the Trafigura's products that were destroyed in the fire incident ('product value');

(iii) US$2,108,497, being the additional costs, fees, and expenses that Trafigura had incurred as a result of the fire incident ('incidental costs'); and

(iv) US$368,547.00, being the refund of the excess advance storage fee payment paid by Trafigura to TLP ('advance storage fee') (see partial award, para. 338).

(k) In para. 344 of the partial award, Tan Sri Dato' Abdul Aziz bin Mohamad, who disagreed with the findings, decisions and award of the majority tribunal in the partial award, dissented and considered that:

(i) The relevant contract for determining liability for the fire incident was the storage agreement;

(ii) Trafigura should be awarded:

(a) advance storage fee payment of US$368,457; and

(b) damages of US$1 million pursuant to cl. 13.4 of the storage agreement.

(iii) All Trafigura's other claims should be dismissed.

Parties' Contentions

[3] The plaintiff (TLP) has applied under s. 37 of the Arbitration Act 2005 (Act 646) ('AA 2005') to set aside the partial award on, amongst others, three main grounds as follows:

(a) The partial award contravenes ss. 30(2) and (5) and ss. 37(1)(a)(iv) and (v) of the AA 2005 ie, that the majority tribunal had exceeded their jurisdiction;

(b) A breach of the rules of natural justice has occurred; and

(c) The partial award is in conflict with the public policy of Malaysia.

In relation to paras. (b) and (c), above the plaintiff relies on:

(a) Section 20 of the AA 2005 read with art. 17(1) of the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules ('the duty to treat parties equally');

(b) Section 33(3) of the AA 2005 read with art. 34(3) of the UNCITRAL Arbitration Rules ('the duty to give a reasoned award'); and

(c) Section 37(1)(b)(ii), s. 37(2)(b)(ii) and s. 39(1)(b)(ii) of the AA 2005 ('the duty to comply with the rules of natural justice').

[4] It is to be noted that the plaintiff's challenge for setting aside the *ex parte* order dated 5 May 2014 obtained by Trafigura for leave to enforce the partial award in terms of the majority tribunal exceeding its jurisdiction and the partial award being in conflict with the public policy of Malaysia under s. 39(1)(a)(iv) and s. 39(1)(a)(v) and s. 39(1)(b)(ii) of the AA 2005 respectively is the same as the grounds of challenge of the plaintiff to set aside the partial award under s. 37(1)(a)(iv), s. 37(1)(a)(v) and s. 37(1)(b)(ii) of the AA 2005. Hence the arguments in relation to the ground of majority tribunal exceeding its jurisdiction and the partial award being in conflict with the public policy of Malaysia raised in encl. 1 will likewise apply to encl. 8.

[5] The jurisdictional challenge was addressed by Dato' Cyrus Das, lead counsel for TLP in OS13 whilst the breach of public policy challenge was addressed by Dato' Nitin Nadkarni, lead counsel for TLP in OS18. Both counsels adopted each other's submission in their applications.

[6] Trafigura opposed the TLP's applications.

[7] I have considered of the written submissions and the oral submissions of both counsels for TLP and Trafigura. My findings are stated below.

Findings

[8] At the outset, it would be useful to reproduce the relevant provisions of the AA 2005 which the plaintiff relies on:

S. 30(2):

(2) In respect of an international arbitration, the arbitral tribunal shall decide the dispute in accordance with the law as agreed upon by the parties as applicable to the substance of the dispute.

S. 30(5):

(5) The arbitral tribunal shall, in all cases, decide in accordance with the terms of the agreement and shall take into account the usages of the trade applicable to the transaction.

S. 37(1):

S. 37(1) An award may be set aside by the High Court only if (material parts):

(a) the party making the application provides proof that:

(i) …;

(ii) …;

(iii) …;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) …; or

(b) the High Court finds that:

(i) …; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred:

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

S. 20:

20. The parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.

S. 33(3):

(3) An award shall state the reasons upon which it is based, unless:

(a) the parties have agreed that no reasons are to be given; or

(b) the award is an award on agreed terms under section 32.

[9] Whilst determining the two applications I have at the forefront of my mind the following legal principles applicable to a case of this nature:

(a) Section 36 of the AA 2005 provides that "An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties". The court should be slow in interfering with an arbitral award, which award can only be set aside under the limited circumstances prescribed by s. 37 of the AA 2005. This principle was echoed by the Court of Appeal in *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395 at 404 [14] following the well settled principle in *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743 where the Federal Court at 748a held that an award is final, binding and conclusive and can only be challenged in exceptional circumstances (*albeit* under the Arbitration Act 1952).

(b) That a setting aside proceeding must never be in the nature of an appeal ie, to guard against the danger of assuming the role of an appellate court as held by the Court of Appeal in *Cairn Energy India Pty Ltd & Anor v. The Government of India* [2010] 2 CLJ 420; [2009] 6 MLJ 795 at 437 (CLJ); 808 [22] (MLJ):

> [22] Generally, to reopen or re-examine the merits of the case and in effect determine, and replace, the findings of the majority arbitrators with the learned JC's view, would fly against all established principles. … There was nothing so manifest or clear that required interference. He, briefly had assumed the duties of the arbitrators, assumed the role of an appellate court, **and culminating in ignoring the wishes of the contesting parties to have the matter arbitrated**.
>
> (emphasis added)

The same principle was followed in *Infineon Technologies (M) Sdn Bhd v. Orisoft Technology Sdn Bhd & Another Case* [2010] 1 LNS 889; [2011] 7 MLJ 539 at 571 para. 71.

(c) In *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33; [2011] 4 SLR 305 where the Court of Appeal in Singapore at 319 [33] stated:

> 33. Third, it is trite that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award under Art. 34(2)(a)(iii) of the Model Law (see *Sui Southern Gas Co Ltd v. Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [19]-[22]. In the House of Lords decision of *Lesotho Highlands Development Authority v. Impregilo SpA* [2006] 1 AC 221, which concerned an application to set aside an arbitral award on the ground of the arbitral tribunal's "exceeding its powers" (see s 68(2)(b) of the Arbitration Act 1996 (c 23) (UK) ("the UK Arbitration Act")), Lord Steyn made clear (at [24]-[25]) the vital distinction between the erroneous exercise by an arbitral tribunal of an available power vested in it (which would amount to no more than a mere error of law) and the purported exercise by the arbitral tribunal of a power which it did not possess. Only in the latter situation, his Lordship stated, would an arbitral award be liable to be set aside under s. 68(2)(b) of the UK Arbitration Act on the ground that the arbitral tribunal had exceeded its powers. In a similar vein, Art. 34(2)(a)(iii) of the Model Law applies where an arbitral tribunal exceeds its authority by deciding matters beyond its ambit of reference or fails to exercise the authority conferred on it by failing to decide the matters submitted to it, which in turn prejudices either or both of the parties to the dispute (see above at [31]).

(d) In *MTM Millenium Holdings Sdn Bhd v. Pasukhas Construction Sdn Bhd & Anor* [2013] 1 LNS 1325 where the Court of Appeal at p. 13 (23):

> 23. From the outset we should state what the Courts' approach today is when faced with an attack on an Arbitral Award. It is now firmly established that the policy employed by the Courts is one of minimal intervention. This policy is nothing but an acknowledgement and respect accorded to the finality to the arbitral process agreed to by the disputing parties. Put in another way, the parties have agreed and preferred that their disputes to be settled outside the Court system and whatever decision that tribunal arrives at shall be final. This policy has given rise to the trite principle that Courts will not interfere even if the arbitrator had made mere errors of law or fact.

Whether Arbitral Tribunal Exceeded Jurisdiction Under s. 37(1)(a)(iv) And (v) In Applying The Wrong Contract And Intermixing The Two Agreements

[10] In approaching this issue it would be useful to refer to *CRW Joint Operation (supra)* wherein the Singapore Court of Appeal at 318 [30] following the Singapore Court of Appeal's decision in *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR 597, held that the test involves a two stage inquiry:

(a) First, what were the matters within the scope of submission to the arbitral tribunal?

(b) Second, whether the arbitral award involved a "new difference" outside the scope of submission and irrelevant to the issues requiring determination?

[11] In applying the test, the Singapore Court of Appeal at 319 para. 31 held that the following legal principles should be borne in mind:

(a) First, the test is not concerned with a situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine.

(b) Second, the test applies where the arbitral tribunal either:

(i) Improperly decided matters that had not been submitted to it; or,

(ii) Failed to decide matters that had been submitted to it.

[12] In *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617 our Court of Appeal at 626 [24] endorsed and applied the test in *CRW Joint Operation* as follows:

> These persuasive cases, and others, that have been addressed by our courts lay down one basic principle - an arbitrator must decide the dispute according to the scope of the arbitration and he cannot decide the dispute on issues that have not been raised or addressed by the parties.

[13] However this test does not apply to complaints that the arbitral tribunal has wrongly decided on matters within its powers or the scope of the submission to arbitration as this would amount to no more than a mere error of law or fact which is not a basis to set aside the award (see p. 319 at [33] in *CRW Joint Operation* referred to in para. 9(c) above).

[14] In this regard I am inclined to agree with the view expressed by Mary Lim J in *The Government of India v. Cairn Energy India Pty Ltd & Ors* [2013] 1 LNS 1323; [2014] 9 MLJ 149 involving a challenge under ss. 37(1)(a)(iv) and (v) of the AA 2005, where in applying the test in *CRW Joint Operation*, Her Ladyship at 186 [137] and 194 at [169] respectively cited with approval the House of Lord's case of *Lesotho Highlands Development Authority v. Impregilo SpA* [2006] 1 AC 221:

> 32. In order to decide whether section 68(2)(b) is engaged it will be necessary to focus intensely on the particular power under an arbitration agreement, the terms of reference, or the 1996 Act which is involved, judged in all the circumstances of the case. In making this general observation it must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power. A mere error of law will not amount to an excess of power under section 68(2)(b).
>
> …
>
> This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vested in the tribunal no excess of power under section 68(2)(b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point. There was no more than an erroneous exercise of power available under section 48(4). The jurisdictional challenge must therefore fail.

[15] Notwithstanding that the *Lesotho's* case was concerned with s. 68(2)(b) of the English Arbitration Act 1996, I am in agreement with Her Ladyship that this "does not alter or reduce its persuasiveness and relevance".

[16] In essence TLP argues that the majority tribunal acted in excess of jurisdiction and the partial award should be set aside under ss. 37(1)(a)(iv) and (v) of the Act for two reasons:

(a) first, the majority tribunal "committed an error of jurisdiction by applying a contract that by the agreement between the parties themselves has ceased to apply." ('TLP's first complaint').

(b) second, further and/or alternatively, the majority tribunal "conflated or intermixed the two agreements and reliefs." ('TLP's second complaint').

[17] Before I delve into the jurisdictional and the natural justice/public policy arguments I find it is especially pertinent to appreciate how the majority tribunal in its partial award of 345 paragraphs approached the

14 issues (paras. 92-93, partial award) during the arbitral proceedings. Amongst others, the majority tribunal sets the 'V. Factual background' (paras. 59-89, partial award) and the 'V1. Parties' requests for reliefs'. In addressing the relevant issues, I find 'the tribunal's findings and decisions' would be preceded by the parties' position.

[18] It is observed that the tribunal is ever conscious of the onerous task that has befallen them and have with much wisdom and prudence categorically caveated in the partial award the following:

> 94. In this section of the Award, the **Tribunal will consider the various issues identified by the Parties to the extent that it is necessary to do so in order to determine the claims advanced and the relief sought in these proceedings**.
>
> 95. The Tribunal has been assisted by ample written and oral submissions from counsel for the Parties. In addition, the Parties have adduced a substantial amount of evidence, including documentary evidence, factual witness evidence and expert reports as well as oral evidence during the Hearing.
>
> 96. The Tribunal considers that it would serve no useful purpose to summarise or address in this Award each and every one of the various arguments and counter-arguments raised by counsel for the Parties in the course of these proceedings. Nor would be useful to attempt to summarise the entirety of the evidence that has been submitted in these proceedings. *The Tribunal will make reference to the various submissions of the Parties and to the evidence, as and when appropriate, in discussing the issues that need to be decided in order to determine the claims presented in this arbitration.*
>
> 97. For the avoidance of doubt, the Tribunal hereby confirms that, in reaching its decisions in this arbitration it has fully taken into consideration all of the written and oral submissions of the Parties, and the entirety of the evidence (whether documentary, witness, expert or otherwise) that has been presented by the Parties, whether or not expressly referred to in this Award.
>
> (emphasis added)

[19] These 'precautionary statements' are not mere lip service because when the partial award is read in its entirety, one will comprehend what they did and why a certain approach was taken by the majority tribunal.

[20] Further it is appropriate for me to reproduce the following salient facts which have been highlighted by Trafigura which in my view are pertinent to appreciating why the majority tribunal decided in the manner it did.

> (a) Trafigura's claims against TLP in the Arbitration were for the loss and damage it had suffered as a result of the Fire Incident and were brought primarily under the Deed of Commitments and, only in the alternative, the Storage Agreement.

(b) Trafigura's primary claim under the Deed of Commitments and alternative claim under the Storage Agreement were both referred to arbitration before the Tribunal.

(c) The Agreed List of Issues was a document jointly prepared and finalised by the Parties. This was a document containing the Parties' agreement on the issues to be submitted to the Tribunal for its determination. In other words, the Agreed List of Issues set out the scope of submission to the Tribunal of the issues under the Deed of Commitments and Storage Agreement that were to be determined by the Tribunal.

(d) Trafigura's primary case in the Arbitration was that the Fire Incident was caused by defects in the design and construction of the Facility. These defects constituted breaches by TLP of the Deed of Commitments.

(e) Trafigura's alternative claims in the Arbitration were that TLP was liable for breaches of the Storage Agreement, and further in tort (negligence) and bailment.

(f) The Majority Tribunal found on the evidence and submissions presented by the Parties that "defects in the design and construction of the Facility were the immediate and proximate cause of the Fire Incident". (Para 152, Partial Award)

(g) The Majority Tribunal also found that these defects in the design and construction of the Facility were caused by TLP's breaches of the Deed of Commitments. (Paras 188 to 227, Partial Award)

(h) Therefore having found TLP liable under Trafigura's primary case under the Deed of Commitments, the Majority Tribunal did not go on to consider Trafigura's alternative cases for breaches of the Storage Agreement, or in tort or bailment, as these "do not fall to be determined by the Tribunal. (Para 228, Partial Award)"

TLP's First Complaint

[21] In respect of the TLP's first complaint, TLP argues that the majority tribunal erred in jurisdiction by applying the wrong contract ie, the deed of commitments as the relevant contract to determine TLP's liability for the fire incident. TLP argues that the majority tribunal failed to consider the relevant clauses of the two agreements (cl. 4.3 of the deed of commitments and cl. 32 of the storage agreement) and the substitution or replacement of one with the other: that on a plain reading of the said clauses, "it can only have one meaning ie, that the storage agreement had replaced the deed of commitments". In support of its arguments TLP cited *Polygram Records Sdn Bhd v. Hillary Ang & Ors (Collectively Known As "The Search") & Anor* [1994] 3 CLJ 806; [1994] 3 MLJ 127 (HC) on the legal effect of substituted contract and *Ramli Shahdan & Anor v. Motor Insurers' Bureau of West Malaysia & Anor* [2006] 1 CLJ 224; [2006] 2 MLJ 116 where the Court of Appeal applied *Polygram Records (supra)* in discussing the doctrine of the novation of contracts under s. 63 of the Contracts Act 1950.

[22] In addition TLP argues the majority tribunal wrongly accepted Trafigura's submission that a term of fitness was implied into the deed of commitments because (i) it was expressly set out in cl. 16.5 of the storage agreement; and (ii) the deed of commitments was already substituted by the storage agreement (see the handout submitted by Trafigura's lead counsel, Mr Tommy Thomas on the errors of law claimed by TLP to have been committed by the majority tribunal). (see pp. 19-44, NOE of 5 May 2015, oral arguments of TLP's lead counsel Dato' Cyrus Das and the cases cited therein are *Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd* [2003] 4 CLJ 294; [2003] 4 MLJ 357 (CA) held 1, *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259; [2005] 4 MLJ 101 (CA) at 112 [12], 113 [12] & 113 [14 H]; both of the aforesaid cases followed *The Central Bank of India, Ltd Amritsar, Appellant v. The Hartford Fire Insurance Co Ltd, Respondent AIR* [1965] SC 1288 for the proposition that:

> [I]t is commonplace that it is the Court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The Court must give effect to the plain meaning of the words however it may dislike the result.

Other cases also include *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 [H/L] at 912 H to 913 D-E, *Lynch v. Thorne* [1956] 1 All ER 744 at 747 F-H for the proposition "[A] warranty that the house, when completed, would be fit for human habitation should not be implied, since there was an express contract between the parties as to the way in which the building was to be completed and the provisions of the contract had been exactly complied with", *Attorney General of Belize And Others v. Belize Telecom Ltd And Another* [2009] 1 WLR 1988 (Privy Council) at 1993 [16], [17] & [19 G-H] for the proposition that:

> If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable.

[23] With respect I am unable to agree with the submission of learned counsel for TLP. Applying the test in *CRW Joint Operation* to the facts of the present case, I find the majority tribunal did not act in excess of jurisdiction in deciding that the relevant contract to determine liability for the fire incident was the deed of commitments as it was an issue that was within the scope of submission to the majority tribunal and the latter's decision did not involve a 'new difference'. The factors which support this position have been succinctly identified and submitted by learned counsel for Trafigura as follows:

(a) First, as this issue was included in the Agreed List of Issues, it was an issue that the Parties had agreed to submit to the Tribunal for its determination, and obviously formed part of the scope of submission to the Tribunal (Affidavit in Reply of Dominic Watters dated 23/4/2014, encl. 11 at paras 26 to 31 and exh. DW-2).

(b) Second, in the course of the Arbitration, the Parties presented extensive submissions on this issue, which reinforces the fact that it formed part of the scope of submission to the Tribunal (Affidavit in Reply of Dominic Watters dated 23/4/2014, encl.11 at paras 38 to 42).

(c) Third, after considering the Parties' extensive submissions on this issue, the Majority Tribunal decided that the Deed of Commitments, and not the Storage Agreement, was the relevant contract to determine liability for the Fire Incident. Thus there was a decision by the Majority Tribunal on this issue in the Partial Award (Partial Award, at paras 190 to 201).

[24] Further, I find the majority tribunal's decision that the deed of commitments is the relevant contract to determine liability for the fire incident was not in excess of jurisdiction and the majority tribunal did not commit an "error of jurisdiction"; the majority tribunal has in fact considered and addressed TLP's first complaint. Nothing could be clearer than an examination of the partial award at paras. 190 to 201. Here the manner in which the majority tribunal arrived at its findings on this issue has been correctly stated by the Trafigura as follows:

(a) Although the Deed of Commitments came to an end and the Storage Agreement came into force (pursuant to Cl.4.3 of the Deed of Commitments and Cl.32 of the Storage Agreement), "this cannot mean that the Deed of Commitments is thereafter of no further relevance in determining the rights and liabilities of the Parties *inter se*". (Partial Award, at para 194).

(b) In finding that the Deed of Commitments was the relevant contract to consider in determining Trafigura's claim for the loss and damage it had suffered as a result of the Fire Incident, the Majority Tribunal expressly rejected TLP's argument, both as a matter of contractual interpretation and on the law, that the effect of Cl. 4.3 of the Deed of Commitments and cl.32 of the Storage Agreement was such that Trafigura had no right to pursue a claim under the Deed of Commitments. (Partial Award, at paras 198-201).

(c) As a matter of law, the Majority Tribunal agreed with Trafigura's argument in the Arbitration below that when a contract comes to an end, this does not relieve the contracting parties of liabilities incurred under the contract before it came to an end. Absent clear and express language to the contrary, a contracting party's right to bring an action in respect of such accrued liabilities survives the end of the contract. (Partial Award, at paras 200-201).

(d) As a matter of contractual interpretation, the Majority Tribunal found that there is nothing in the language of the Deed of Commitments or the Storage Agreement which suggests that Trafigura had agreed to give up

A or waive its rights in respect of any liabilities that TLP may have owed to it under the Deed of Commitments before it ceased to be of further force and effect. (Partial Award, at para 199).

(e) Accordingly the Majority Tribunal found that "there is no merit in the Respondent's contention that "the only contract to be considered in
B determining the rights and liabilities of the parties *inter se* in this proceeding is the Storage Agreement." That the Deed of Commitments ceased to be of further effect when the Parties entered into the Storage Agreement **did not extinguish the Claimant's accrued rights in relation to the Respondent's breaches of the Deed of Commitments that occurred while the Deed was still in force**." (emphasis added) (Partial Award, at
C para 201)."

[25] In addition, with respect I am of the view that the first complaint of the plaintiff cannot be sustained for these reasons:

(a) The majority tribunal had considered and rejected TLP's argument in
D respect of the effect of cl. 4.3 of the deed of commitments and cl. 32 of the storage agreement in paras. 190 to 201 of the partial award which I have alluded in para. 23 above. This was a finding of fact of the majority tribunal going to the merits of the case that notwithstanding these provisions, the deed of commitments was the relevant contract to determine liability for the fire incident.

E

(b) By seeking to reopen the merits of the majority tribunal's decision, I find:

(i) the plaintiff is in fact challenging the majority tribunal's decision of the effect of cl. 4.3 of the deed of commitments and cl. 32 of the
F storage agreement under the guise of a challenge for excess of jurisdiction which is not permissible in law. This is borne out in the cases of *AJWA*, *Intelek Timur*, *Infineon and Cairn Energy India (supra)*;

(ii) the plaintiff has now recharacterised its case and seeks to argue that
G the deed of commitments was novated or rescinded (s. 63 of the Contracts Act argument) when the parties entered into the storage agreement. However such a course of action is no longer open to the plaintiff having had every opportunity to ventilate such an argument in the arbitration but never did so. The *dicta* from the persuasive
H authority of the Singapore Court of Appeal *BLC And Others v. BLB And Another* [2014] 4 SLR 79 which reversed the High Court's decision to set aside the arbitral award is apposite:

> [53] … The setting aside application is not to be abused by a party who, **with the benefit of hindsight, wished he had**
I **pleaded or presented his case in a different way before the arbitrator**.

> [84] … the Respondents' blatant attempt to rely on this recharacterised case and to pin the blame on the Appellants ought to be rejected. *Put simply, the Respondents are seeking to put forward the case they wished they had put forward before the arbitrator and not the case which was actually run in the arbitral proceedings themselves*. (emphasis added)

(c) Even if for argument sake, the majority tribunal had erred in deciding that the deed of commitments and not the storage agreement was the relevant contract to determine liability for the fire incident (which I have held otherwise), this was an error in the exercise of the power vested in the majority tribunal to decide on an issue that was referred to it and was within its scope of submission and not in respect of a 'new difference' outside the scope of submission; such an error does not and cannot amount to excess of jurisdiction warranting a setting aside of the partial award under ss. 37(1)(a)(iv) and (v) of the AA 2005 (see *CRW Joint Operation* and *Cairn Energy India*).

(d) I am of the view that it is unnecessary for me to consider the cases of *Ramli Shahdan (supra)* and *Polygram Records (supra)* cited by TLP in support of the principle of rescission and novation. Be that as it may, with respect I am of the view the cases of *Ramli Shahdan* and *Polygram Records* cited by TLP can be distinguished. In this regard I am persuaded by Trafigura's submission as follows:

(i) The terms 'rescission' or 'novation' are explained in *Chitty on Contracts* (31st edn, 2012) at [22-025] and [22-031] in this manner:

> **Rescission by agreement**. Where a contract is executory on both sides, that is to say, **where neither party has performed the whole of its obligations under it**, it may be rescinded by mutual agreement, express or implied. **A partially executed contract** can be rescinded by agreement **provided that there are obligations on both sides which remain unperformed**. Similarly, **a contract which has been fully performed by one party** can be rescinded provided that the other party returns the performance which it has received and in turn is released from its own obligation to perform under the contract. …
>
> **Novation**, Novation is a generic term which signifies:
>
> "… that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; **the consideration mutually being the discharge of the old contract**." …
>
> (emphasis added)

Based on the definitions thereof, it means that rescission or novation apply to executory contracts or executed contracts under which one party still has an outstanding obligation. The cases of *Ramli Shahdan* and *Polygram Records* involve rescission or novation of executory contracts "under which there remained outstanding obligations to be performed at the time of rescission or novation."; whereas in this instant case, the deed of commitments had been performed when it came to an end ie, "ceased to be of further force and effect".

(ii) More importantly, whether a contract has been rescinded or novated is to be determined by the objective intentions of the parties as seen from the substance of the agreement ie, the express wording of the relevant contractual provisions must be considered in the circumstances of the case (see *Pollock & Mulla's Indian Contract & Specific Relief Acts*, 13th edn. 2006, pp. 1227-1228), *Chitty on Contracts*, 31st edn, 2012 paras. 12-043). There is nothing in the language of the deed of commitments or the storage agreement which suggests that the former was rescinded or novated once the parties entered into the storage agreement. Hence in the present case, to reiterate I am of the view the majority tribunal had correctly made the correct findings in paras. 190 to 201 of the partial award for the reasons which I have alluded to at para. 23 above.

(e) As for the 'fit for purpose' argument under cl. 16.5, I find the majority tribunal has considered the same in paras. 156 -173 & 177 (Trafigura's position) of the partial award when it considered issue 3, "Whether the respondent is liable pursuant to the terms of the deed of commitments for the failure in the design and/or construction of the facility". The tribunal's findings and decision on this issue which is an alternative argument is found in paras. 160-215 of the partial award. For clarity, paras. 160 and 215 are reproduced:

> 160. The Claimant's second, or alternative, argument is that the defects in the design and/or construction of the Facility amount to a breach by the Respondent of an implied term in the Deed of Commitments that the Facility, as designed and built, would be fit for its intended purpose of "receiving, storing, blending, circulating, transferring and discharging of Products."
>
> 215. In addition to finding that the Respondent is liable to the Claimant for defects in design and/or construction under the express terms of the Deed of Commitments, the Tribunal also agrees with the Claimant's submission that a term should be implied in the Deed of Commitments that the Facility, as designed and built, would be fit for its intended purpose,

TLP's Second Complaint

[26] TLP's second complaint is that the majority tribunal had conflated or intermixed the deed of commitments and the storage agreement and the reliefs (which could be subjected to a limitation under the storage agreement) that could be granted from the breach of the agreements. In essence TLP argues that the majority tribunal had exceeded its jurisdiction by awarding Trafigura for loss of use of the facility under the storage agreement without first finding a breach of the storage agreement. The case of *Thai-Lao Lignite Co Ltd & Anor v. Government of the Lao People's Democratic Republic* [2014] 1 LNS 525 ('the *Laos*'s case') was cited wherein the Court of Appeal made reference to the judgment of Lee Swee Seng JC (as he then was) at [84], [110] and [124] and affirmed the decision in setting aside an award for an international arbitration for excess of jurisdiction under s. 37(1)(a)(iv) and (v) of the AA 2005.

[27] With respect I am of the view the aforesaid argument of TLP is without merit and there is no basis to set aside the partial award for the following reasons stated in Trafigura's submission.

[28] TLP argues that:

(a) the claim for and award of damages arose out of TLP's failure to fulfil its obligations under the storage agreement to provide storage services for seven years; and

(b) in order therefore to award damages for the failure to provide storage services for seven years, the majority tribunal had to find that TLP breached the storage agreement.

[29] I find this is a mischaracterisation of both TLP's claims in the arbitration and the majority tribunal's award of damages in the partial award because:

(i) Trafigura's primary claims in the arbitration were:

(a) Defects in the design and construction of the facility caused the fire incident as a result of which Trafigura suffered loss and damage. This included loss of use of the facility for a period of at least seven years;

(b) TLP was liable to Trafigura for breaches of the deed of commitments for the design and construction defects which caused the fire incident. Accordingly, TLP was also liable to Trafigura for the loss and damage suffered by Trafigura as a result of the fire incident; including loss of use of the facility for a period of at least seven years; and

(c) This was because Trafigura always had a legitimate expectation to use the facility for a period of at least seven years after the construction of the facility was completed under the deed of commitments.

(ii) Whilst in the partial award, I find the majority tribunal held in favour of Trafigura's primary claims as follows:

(a) The defects in the design and construction of the facility caused the fire incident and TLP was liable to Trafigura under the deed of commitments for the said defects (partial award, at paras. 132 to 152 and 188 to 227).

(b) As a result of the fire incident, Trafigura had suffered loss and damage which TLP was liable to Trafigura. Trafigura always had a legitimate expectation to use the facility for a period of at least seven years after the construction of the facility was completed. Accordingly, the majority tribunal awarded damages to Trafigura for, *inter alia*, loss of use of the facility for a period of seven years (partial award, at paras. 256 to 336).

(iii) Since both Trafigura's primary claims and the majority tribunal's award of damages including damages for loss of use of the facility were raised and given under the deed of commitments (see partial award at para. 235), this puts paid to TLP's argument that the award for loss of use of the facility was for "TLP's failure to fulfil its obligations under the storage agreement to provide storage services for seven years". Accordingly, it follows that there is no issue whether "in order therefore to award damages for the failure to provide storage services for seven years, the majority tribunal had to find that TLP breached the storage agreement", given that this was neither Trafigura's claim nor the majority tribunal's award of damages;

(iv) The majority tribunal had expressly stated it was not necessary to consider Trafigura's alternative claim for breaches of the storage agreement (including TLP's failure to provide storage services for seven years) having found for Trafigura on its primary claim under the deed of commitments. This is apparent from para. 228 of the partial award to the effect:

> [228] **In view of the Tribunal's findings and decisions above**, the issues arising under issues 4, 5, 6, 7 and 8 as well as the Claimant's alternative causes of action as set out in the Claimant's pleadings and summarised in Section VII of its Post-Hearing Brief do not fall to be determined by the Tribunal.
>
> (emphasis added)

[30] The above emboldened statement is significant. In my view they encapsulate the following tribunal's findings and decisions sequentially:

(a) On agreed issue 1 of the relevant contract in determining liability for the fire incident, whether deed of commitments, the storage agreement or both (partial award at para. 98);

(b) The tribunal's consideration of the contentions advanced by Trafigura under its primary case that "the deed of commitments is the relevant contract for consideration in determining liability for the fire incident and the issues related thereto" (partial award at para. 106);

(c) The tribunal's finding in respect of agreed issue 2 (whether a failure in design/construction of the facility was an effective cause of the fire incident) (partial award at paras. 107 to 152) and concluded "the defects in the design and construction of the facility were the immediate and proximate cause of the fire incident"; and

(d) The tribunal's finding on agreed issue 3 (whether the respondent is liable pursuant to the terms of the deed of commitments for the failure in design and/or construction of the facility (p. 27 partial award) and the tribunal decided that "the respondent (TLP) is liable to the claimant (Trafigura) pursuant to the terms of the deed of commitments for the defects in the design and construction of the facility that caused the fire incident" (partial award at para. 227).

[31] For argument sake, even if TLP is correct (which I hold otherwise) in that the majority tribunal had "conflated or intermixed the two agreements and reliefs", it had not decided on a 'new difference' outside the scope of submission to arbitration or a matter that had not been submitted to it (see *CRW Joint Operation*). To amplify (i) throughout the arbitration, Trafigura's primary case is, it was entitled to claim damages for loss of use of the facility for a period of at least seven years as a result of the fire incident which TLP was liable for under the deed of commitments as defects in the design and construction of the facility caused the fire incident; and (ii) this was a claim that had been submitted to the tribunal for its determination and was well within the scope of submission to the majority tribunal. Therefore, even if the majority tribunal had erred in finding in favour of Trafigura on its primary case, this was merely an error in the exercise of the power vested in it to decide on an issue that was referred to it and that was within the scope of submission. Premised on well-established principles propounded in *CRW Joint Operation* and *Cairn Energy* such an error does not and cannot amount to an excess of jurisdiction rendering the partial award liable to be set aside under ss. 37(1)(a)(iv) and (v) of the AA 2005.

[32] With regard to TLP's argument on 'without first finding a breach of the storage agreement' referred in para. 28(b) above, I am of the view that having found TLP liable to Trafigura for breaches of the deed of commitments which caused the fire incident, the majority tribunal had to quantity the loss and damage suffered by Trafigura as a result of the fire incident. One of the losses claimed by Trafigura was the loss of the use of facility for the period from the date of the fire incident on 17 August 2008 until 31 May 2015 (the date of expiry of the initial seven-year term of the storage agreement) (partial award at para. 256).

[33] On the extent or period of time that Trafigura should be compensated of Trafigura's loss of use, Trafigura had a legitimate expectation to use the facility for a period of at least seven years after the construction of the facility was completed (minimum lifespan of the storage agreement). TLP position is that this expectation arose only under the storage agreement. The tribunal considered the defences of TLP that Trafigura was not entitled to damages for loss of use of the facility including the losses claimed were too remote, speculative and uncertain (partial award at paras. 258-261). It can be observed that after "Having considered carefully all of the submissions of both parties", the tribunal agreed with Trafigura's submission and found "The claimant's business model centres on the blending and trading of gasoline. Pursuant to the deed of commitments and the storage agreement, the claimant contractually bargained for and had the legitimate expectation that it would have use of the storage capacity at the facility for a period of at least seven years." (partial award at paras. 262-265).

[34] I am in agreement with Trafigura's submission that the finding of the majority tribunal accords with the factual matrix of the case:

(a) Clause 4.3 of the Deed of Commitments provided that 10 days after the Practical Completion Date of the construction of the Facility, TLP and Trafigura will enter into the Storage Agreement.

(b) A draft of the Storage Agreement was annexed as Appendix 3 to the Deed of Commitments. Clause 3.1 of the draft Storage Agreement provided that the Storage Agreement will be in force for a period of at least 7 years.

(c) Clause 3.1 of the draft Storage Agreement was exactly the same as Clause 3.1 of the Storage Agreement that TLP and Trafigura eventually entered into.

[35] Further, in this regard to amplify the point, I accept Mr Tommy Thomas' oral submission at pp. 78-84 NOE dated 6 May 2015 that having regard to the relevant provisions of the deed of commitments and the storage agreement, commercial reality and commercial dynamics which the tribunal was mindful of, as follows:

> So we look at this transaction from a commercial business point of view. So, what is happening, My Lady, is that, in May, 2005, the parties agreed to this transaction which is to be documented into two agreements, to be signed over two, three years. But it is one transaction to a large extend (sic). And the transaction is this. The transaction is that TLP must go and build seven tanker or tanks, or whatever, what they call works at their cost. They take the risk, they do all those things, designing it and appointing engineers and whatever but they know, TLP knows that when they complete the project, the works, they have a guaranteed consumer which is Trafigura which will use the facility for seven years, a minimum period of seven years which I will come to in the Storage Agreement. But My Lady, it is in the sense very artificial and divorced from commercial reality if one takes them in that sense separately because ...

> … when you sign, when they signed it on the 10.05.2005, they already have Appendix 3. They already had the Storage Agreement draft. And if you look at Clause 3, which I will come to it. There is a term.
>
> And the term is for seven years and whatever. So, what we are saying, My Lady, is that the transaction was such that it would be when the tanks are completed, Trafigura will occupy it for seven years, minimum of seven years, obviously for rental, there is a storage fees, sole and exclusive. And therefore, TLP's capital investment for constructing the tanks is not wasted. So basically they are locking in, My Lady, they are locking. When they signed on the 10th May, there is a locked in relationship and it is already agreed, only thing not signed that the storage it would be or seven years and then extended. And that make sense from the commercial point of view because Johor Corp/TLP will say 'Look, why are we spending hundreds of millions of dollars building these seven tanks if we have no customer?' So, that is from their point of view. From Trafigura's point of view, they obviously needed these tanks to park, to keep their petroleum and oil products and that was so. There was a guaranteed warehouse for them. So that was the deal, My Lady. But for whatever legal reasons, it could be lawyers advising or whatever, they documented it into two agreements.
>
> So, in that sense it is very, very artificial and divorced from commercial reality to treat them as if they are hell of a separate. They are of course separate. They are a separate but they are interlinked. You cannot see one separate from the other.

[36] The case of *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 (FC) at 324 in support of proposition that it is trite that there can be no award of damages under a contract without first being found a breach of the contract. With respect I am of the view that the case of *Lai Yoke Ngan* does not assist TLP. In the factual matrix of the present case I find the majority tribunal decided as they did for the reasons given by Trafigura:

> [T]he Majority Tribunal found that the Fire Incident was caused by "defects in the design and construction of the Facility". (See paragraphs 132 to 152 (in particular, paragraph 152) of the Partial Award.) The Majority Tribunal then went on to find that TLP was liable to Trafigura under the Deed of Commitments for the "defects in the design and construction of the Facility that caused the Fire Incident". (See paragraphs 188 to 227 (in particular, paragraph 227) of the Partial Award.)
>
> On this basis, the Majority Tribunal proceeded to award damages to Trafigura for the "defects in the design and/or construction of the Facility that caused the Fire Incident". (See paragraphs 235 to 341 (in particular, paragraph 235) of the Partial Award.) In other words, the Majority Tribunal's award of damages was given under the Deed of Commitments.
>
> As such, there is plainly no question of the Majority Tribunal giving an award of damages under a contract without first finding a breach of that contract.

[37] Hence I find TLP's second complaint that the majority tribunal had 'conflated and intermixed the two agreements' cannot be sustained and there is nothing improper with the majority tribunal's award of damages. Even if it can be argued that the expectation arose only under the storage agreement, it does not mean that the majority tribunal had "conflated or intermixed the two agreements". The reason being there is nothing improper with the majority tribunal awarding damages under the deed of commitments for Trafigura's loss of use of the facility with reference to Trafigura's expectation under the storage agreement to use the facility for the minimum period of seven years. Resorting to calculation of damages by reference to a related contract in an action for breach of contract is supported by reference to the authorities cited by Trafigura:

(i) illustration (l) to s. 74 of the Contracts Act 1950 (Compensation for loss of damage caused by breach of contract):

> A, a builder, contracts to erect and finish a house by 1 January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before 1 January, it falls down and has to be rebuilt by B, who in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. **A must make compensation to B for the cost of rebuilding the house, for the rent lost and for the compensation made to C**. (emphasis added)

(See *Bank Utama (Malaysia) Bhd v. Insan Budi Sdn Bhd* [2009] 1 CLJ 221; [2009] 1 MLJ 148 wherein Court of Appeal upheld the High Court's finding in awarding damages to the respondent including profits that the respondent could have made from the re-sale contract with the third party buyer (at 254 [81-83]).

[38] With respect to the *Laos*'s case, I am of the view that TLP's reliance on the *Laos'*s case is misplaced. I gratefully adopt Trafigura's submission that *Laos*'s case does not assist TLP for these reasons:

(a) In the High Court [in the *Laos* case], Lee Swee Seng JC held that in awarding damages for the costs of investment made under the two earlier mining contracts, the arbitral tribunal had exceeded its jurisdiction and ordered the arbitral award to be set aside under ss. 37(1)(a)(iv) and (v) of the Act.

(b) The Majority Tribunal's award of damages was not given under the Storage Agreement or in respect of TLP's failure to perform or breaches of the Storage Agreement. The Majority Tribunal's award of damages was therefore given under the same contract as which liability was found ie, the Deed of Commitments.

(c) Even if it can be said that the Majority Tribunal's award of damages were given under the Storage Agreement, the *Laos* case still does not assist TLP because the facts in the present case are dramatically different and can be distinguished from the *Laos* case as follows:

(i) First, the governing law and dispute resolution mechanism for the mining contracts and the PDA were different. Under the mining contracts, the governing law was Laotian law and disputes were to be referred to the Laotian Court, the Laotian Board of Economic Conciliation, or the International Dispute Settlement Organisation. Under the PDA, the governing law was a mix of Laotian law and New York Law and disputes were to be referred to arbitration.

In the present case, the governing law and dispute resolution mechanism under both the Deed of Commitments and the Storage Agreement are exactly the same; with both being Malaysian law and arbitration under the UNCITRAL Arbitration Rules as presently in force.

(ii) Second, the arbitration in the *Laos* case was commenced pursuant to the PDA only, whereas in this case, the arbitration was commenced pursuant to both the Deed of Commitments and Storage Agreement. As such, the Tribunal has jurisdiction over both the Deed of Commitments and Storage Agreement and has the power to decide on all matters submitted to it under both contracts.

(iii) Third, in the *Laos* case, the plaintiff had in the course of the arbitration questioned the jurisdiction of the arbitral tribunal over the two defendants' claims for costs of investments made under the two earlier mining contracts. However in this case TLP has never challenged the tribunal's jurisdiction over any of Trafigura's claims in the course of the Arbitration.

Breach Of s. 30(2) And (5) Of AA 2005: Failure To Apply The Express Terms Of The Contracts Between The Parties

[39] Section 30(2) of the AA 2005 requires the arbitral tribunal to apply the chosen law of the parties as its governing law whilst s. 30(5) of the AA 2005 requires the arbitral tribunal to decide in accordance with the terms of the agreement and shall take into account the usages of the trade applicable to the transaction.

[40] TLP seeks to set aside the partial award as it submits there was a breach of both provisions in that there was an express failure by the arbitral tribunal to consider and/or give effect to the following express terms of the contracts between the parties: (i) cl. 4.3 of the deed of commitments and cl. 32 of the storage agreement; and (ii) cl. 32 of the storage agreement (ie, the entire agreement).

[41] TLP argues that:

(i) In deciding that the Deed of Commitments is the applicable agreement to determine the rights and obligations of the Parties in the present case, the Majority Tribunal failed to give effect to cl. 4.3 of the Deed of Commitments and cl. 32 of the Storage Agreement which declared that the Deed was to have no further force or effect once the Storage Agreement was executed. In so doing, the Majority Tribunal failed to give effect to cl. 13.4 of the Storage Agreement, which limits the damages payable to the amount of USD $1 million.;

(ii) [B]y the operation of cl. 4.3, the Deed of Commitments is no longer valid and is now replaced by the Storage Agreement. This is underscored by the fact that the Entire Agreement clause in cl. 32 of the Storage Agreement does not allow any other term to be implied or to import any terms or conditions from prior agreements or otherwise that is not contained in the Storage Agreement. In fact, it is specified in cl. 32 that "**all prior agreements or understandings, inducements or conditions, express or implied, oral or written including the Deed of Commitment, which shall**, upon the execution of this Agreement, **cease to be of further force and effect**. (emphasis added)

(iii) It is to be further noted that the Majority Tribunal's Partial Award has also breached s. 30(2) of the Act in contravening s. 63 of the Contracts Act 1950, as Malaysian law is the operative law in the present case. The said section provides that: "If the parties to a contract agree to substitute a new contract for it, or to rescind, or alter it, the original contract need not be performed."

(iv) [I]f TLP had breached cl. 13.4 of the Storage Agreement, the Loss of Use of Facility Damages could not exceed USD1 million. Cl. 13.4 states:

> 13.4 Limitation of liability.
>
> Neither party shall be liable to the other in contract or negligence for any sum exceeding Unites States Dollar One Million (US$1,000,000.00) or for any indirect, consequential or special losses or damages of the other party.

(v) The Majority Tribunal completely failed to consider and address the effect of cl.13.4 on TLP's liability for any failure to comply with its obligation under the Storage Agreement to provide storage services for 7 years. This failure is apparent from paras 229 to 234 of the Partial Award, where the Majority Tribunal restricted itself to only considering whether cl.13.4 limited TLP's liabilities under the Deed of Commitments.

(vi) [S]ince the Majority Tribunal did not find a breach of the Storage Agreement, they could not have awarded US$118,374,250, being damages for Trafigura's loss of use of the Facility for the 7 year minimum lifespan of the Storage Agreement.

(vii) Conversely, if the Majority Tribunal had found TLP to be in breach of the provision in the Storage Agreement, they were obliged, but failed, to consider TLP's principal defence: that cl.13.4 of the Storage Agreement limited TLP's liability for such breach to US$1 million.

[42] In support of its argument, TLP cites: A

(a) s. 28(1)(a), (b)(i) and 28(3) of the Indian Arbitration And Conciliation Act 1996;

(b) *Oil and Natural Gas Corporation Limited v. Saw Pipes Ltd* A.I.R. 2003 S.C. 2629 ('the *Saw Pipes*'s case' at 2637 [12], 2655 to 2656: B

> [T]he Supreme Court held that an award contrary to substantive provisions of law or the provisions of the Arbitration and Conciliation Act 1996 or against the terms of the contract would be patently illegal and if it affects the right of the parties, it would be subject to interference under s. 34(2) of the Act [the equivalent provision of Malaysian s. 37 of the Act]. C

(c) *Rajasthan State Mines & Minerals Limited v. Eastern Engineering Enterprises & Anor* AIR 1999 SC 3627, 3635:

> the Indian Supreme Court held that where the fundamental terms between the parties are ignored by the arbitrator, such arbitrator is said to exceed his jurisdiction even where the arbitration clause is widely worded. D

(d) *The Law and Practice of Arbitration and Conciliation*, OP Malhotra & Indu Malhotra, Edition [I] [28-14] at p. 909 where the learned author referred to *Gas Authority of India Ltd v. Bhagheertha Engg Ltd* 2002 (Supp) Arb LR 593(Del) at pp. 603 [44], [45] to 604 [45], [46] where the award ignored the contractual stipulation hence was contrary to s. 28(3) of the Arbitration Act; E

(e) *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd* [2005] 2 CLJ 596; [2005] 3 MLJ 585 (CA) at 593 [7] to 594 [7], [8], [9]; F

(f) *BCM Development Sdn Bhd v. The Titular Roman Catholic Bishop of Malacca Johore* [2010] 8 CLJ 920; [2010] 5 MLJ 778 (CA) at 789 [29]

(both cases (e) & (f) deal with *entre* agreement clauses).

[43] With respect I am of the view that the arguments of TLP that the majority tribunal had contravened ss. 30(2) and (5) of the AA 2005 cannot be sustained for the following reasons. G

(a) Sections 30(2) and (5) of the AA 2005 are not independent grounds on which the arbitral award may be set aside; the reason being the grounds for setting aside an arbitral award are limited to those found in s. 37 of the AA 2005. This is in fact apparent from a plain reading of the statute itself, ie, the opening words of s. 37 that "An award may be set aside by the High Court only if …". In this regard I share the view as expressed by Mary Lim J in *Cairn Energy* at 182-183: H I

> [122] … the discretion [of the High Court to set aside an award] ought to be exercised **only and only if it is proved to the court the matters complained of**. First of all, the phrase 'only if' is

A indicative of the intention of Parliament that the courts be conferred a limited discretion. **By limited, it is to say that the discretion is subject to the provision of proof of any or all the matters complained of in (a)(i) to (vi) and/or (b)(ii)**.

[126] ... It is only where the court is satisfied that there is B evidence certain of the matters alleged that the court has discretion to intervene for the purposes of setting aside the award. **Where the court is not satisfied, it may be argued that there is no discretion at all. Again, this would be due to the presence of the clear emphatic words of 'only if'**.

C (emphasis added)

(b) For that matter in the cases of the *Saw Pipes*'s case *(supra)* and *Rajasthan State Mines & Minerals Limited (supra)*, the Indian Courts held that the arbitral awards in question were liable to be set aside not because the arbitral tribunal had failed to comply with s. 28(2) of the Indian D Arbitration And Conciliation Act 1996 *per se* (which is similar to ss. 30(2) and (5) of the AA 2005), but because the arbitral tribunal's failure to comply with s. 28(2) of the Indian Arbitration & Conciliation Act 1996 amounted to a conflict with the public policy of India, which rendered the arbitral awards in question liable to be set aside under s. 34(2)(b)(ii) of the Indian Arbitration And Conciliation Act 1996 E (which is in *pari materia* with s. 37(1)(b)(ii) of the AA 2005).

(c) In fact this position is acknowledged by TLP itself at para. 3 of TLP's supplementary submission dated 10 April 2015 to the effect:

F The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration or UNCITRAL Model Law of 1985 (the "**Model Law**") contains an **exclusive list of limited grounds** on which an award may be set aside.

...

G The Arbitration Act 2005 (the "**2005 Act**") is said to be **a statutory enactment of the Model Law**.

(emphasis added)

(d) In essence the Indian approach advocated in the *Saw Pipes's* case and H *Rajasthan State Mines & Minerals Limited* is this: "an arbitral award may be set aside for being in conflict with public policy if the court disagree with the arbitral tribunal's interpretation and application of the governing law of the contract and/or the terms of the contract to the facts of the case (ie, what the court deems to be errors of law or fact). I am not inclined to follow the Indian approach as urged upon the court I by Dato' Cyrus Das. Rather I am persuaded by the cogent reasons to decline following the Indian approach as submitted by Trafigura:

(a) The Malaysian courts have declined to follow the Indian approach: in *Infineon*, the High Court described the *Saw Pipes*'s case as embodying the "extreme approach" (572 [74]) and *Cairn Energy* where Mary J considered the *Saw Pipes*'s case and preferred to follow the approach in *PT Asuransi*; the reasoning adopted by the Singapore Court of Appeal in *PT Asuransi* for rejecting the Indian approach is found in 192 [163] of *Cairn Energy* as follows:

> 57. While we have the greatest respect for the Supreme Court of India, we do not think that the reasoning in that decision is applicable to the legal framework under the Act. *In our view, the legislative intent of the Indian Act reflected in the Indian decision is not reflected in the [Singapore International Arbitration Act] which, in contrast, gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations*. The legislative policy under the Act is to minimise curial intervention in international arbitrations. *Errors of law or fact made in an arbitral decision, per se, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under s. 24 of the Act and Art. 34 of the Model Law*. While we accept that an arbitral award is final and binding on the parties under s. 19B of the Act, we are of the view that **the Act will be internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact**. For consistency, such errors may be set aside only if they are outside the scope of the submission to arbitration. *In the present context, errors of law or fact, per se, do not engage the public policy of Singapore under Art. 34(2)(b)(ii) of the Model Law when they cannot be set aside under Art. 34(2)(a)(iii) of the Model Law*.
>
> (emphasis added)

(b) The trend adopted by the courts in other foreign jurisdictions is discernible from the observation of Mary Lim J in *Cairn Energy* at 192 [164] which is a relevant factor to be considered:

> [164] Aside from the courts in Singapore (see also *Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd and Another* [2006] 3 SLR 174; *Soh Beng Tee & Co Pte Ltd v. Fairmont Development Pte Ltd* [2007] 3 SLR (R) 86, *AJU v. AJT* [2011] 4 SLR 739), the courts in Hong Kong (see *Hebei Import & Export Corp v. Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111) and New Zealand (see *Downer-Hill Joint Venture v. Government of Fiji* [2005] 1 NZLR 554) have taken similar approaches.

(c) The Indian approach is also not compatible with the policy of the Malaysian Courts of minimal curial intervention as articulated by David Wong Dak Wah JCA (on behalf of the Court of Appeal) in

the recent decision (8 July 2015) of *The Government of India v. Cairn Energy India Pty Limited & 2 Ors* (Dalam Mahkamah Rayuan, Malaysia (Appeal Jurisdiction) Rayuan Sivil/Rayuan No. W-02(NCC)(A)-2404-10-2012) [22], [23], [37] and [38] as follows:

> 22. Further the law is crystal clear in that even if the arbitral tribunal was wrong in its interpretation of the terms in the PSC, it is not a ground for Court's intervention. *That is the philosophy behind Arbitration Act 2005. The simple rationale behind this philosophy is that the parties have agreed to have their disputes settled or resolved by an arbitral tribunal rather than the Court of law and with that agreement, they have also agreed to abide by the decision of that tribunal irrespective whether the same is correct or not. The window of opportunity for Court's intervention is for all intents and purpose closed save and except when the arbitral tribunal had exceeded its jurisdiction*. We see no "rewriting" of the PSC. It was only a pure and simple exercise in construction of an agreement between contracting parties.
>
> 23. Arbitration Act 2005 was enacted with the Model Law in mind. What is stated by the learned authors in Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th Ed. 2004) is of persuasive value:
>
> > *… there is no provision in the Model Law for any form of appeal from an arbitral, on the law or on the fact, or for any judicial review of the award on its merits, if the tribunal has jurisdiction. The correct procedures are followed and correct formalities are observed, the award - good, bad or indifferent - is final and binding on the parties.*
>
> …
>
> 37. It is our view that Courts must continue to keep "hands off" attitude when dealing with arbitral award for the simple reason that there is an express agreement between the parties that they prefer that their disputes to be resolved by an arbitral tribunal and not within the judicial system. Whatever the parties' reasons for such preference is of no concern to the Courts. **As in all commercial agreements, Courts must give effect to or respect to parties' intentions**.
>
> 38. In this appeal, we find no difficulty in concluding that what the arbitral tribunal did was to give effect what the Appellant and Respondents had agreed to do and that was simply to resolve a claim according to the terms of the PSC. **There was no determination by the arbitral tribunal outside the submissions of the parties. There was no wrongful assumption of jurisdiction**. In short it was a simple matter of putting to a construction to an agreement reached between the parties. *Whether that was right or wrong,*

that is no concern of this Court but the concern of the parties themselves. For the Appellant to seek remedy in Court when the decision is not in their favor is contrary to what they had agreed to do and that is to be bound by the decision of the arbitral tribunal.

(emphasis added)

[44] Further in [24] His Lordship made reference to the case of *Downer-Hill Joint Venture (supra)* (referred to by Mary Lim J in *Cairns Energy* at [164]) as follows:

[The High Court of New Zealand] cited Lord Mustill's opinion in *Pupuke Service Station Ltd v. Caltex Oil (NZ) Ltd* [2000] 3 NZLR 338 (PC) at pp. 338-339 with approval and states as follows:

[1] Arbitration is a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and they bind themselves to accept that decision, once made, whether or not they think it right. In prospect, this method often seems attractive, in retrospect, this is not always so. Having agreed at the outset to take his disputed away from the Court the losing party may afterwards be tempted to think better of it, and ask the Court to interfere because the arbitrator has misunderstood the issues, believed an unconvincing witness, decided against the weight of the evidence, or otherwise arrived at a wrong conclusion. All developed systems of arbitration law have in principle set their face against accommodating such a change of mind. The parties have made a choice, and must abide by it. This general principle is, however, applied in different ways under different systems, according to the nature of the complainant.

[2] Where the criticism is that the arbitrator has made an error of fact, it is an almost invariable rule that the Court will not interfere. Subject to the most limited exceptions, not relevant here, the findings of fact by the arbitrator are impregnable, however flawed they may appear. On occasion, losing parties find this hard to accept, or even understand. The present case is an example.

[3] At the other extreme are complaints that the decision has been reached by methods which are unfair, contrary to natural justice, in breach of due process, or whatever the term is preferred. With very few exceptions all systems of law permit the injured party some means of recourse. They need not be explored, since there are no such allegations here.

[45] Further at [25] of the judgment, His Lordship opined:

We have no issue with Appellant's learned counsel's proposition that the Court must act when the arbitral tribunal exceeds its jurisdiction. That is provided for by statute law - section 37 Arbitration Act 2005. As pointed out by us above, the arbitral tribunal did nothing to exceed its jurisdiction. **It just exercised its jurisdiction when it took on the task of interpreting**

A **the terms of the PSC. In other words, we are and cannot be concerned whether the interpretation of the arbitral tribunal is correct or not. Our stand must be one of a 'disinterested umpire**'.

(emphasis added)

B **[46]** This appeal was against the decision of the High Court in refusing to sustain an application by the appellant, the Government of India to set aside an international arbitral award in respect of an arbitration between parties. The Court of Appeal dismissed the appeal and thus affirmed the decision of Mary Lim J in this case. One of the main grounds of complaint was on jurisdiction issue where the appellant complained that the learned judge had C amongst others failed to appreciate that the arbitral tribunal had exceeded its jurisdiction when it decided on matters which were not within the terms of submission to arbitration and failed to rule that the award is contrary to public policy. The Court of Appeal rejected the submissions of the appellant that the arbitral tribunal had exceeded its jurisdiction by going outside the D terms of the PSC on the Cap and Reservoir issues. The grounds mounted are the very same arguments ventilated before me and hence the abovesaid *dicta* which I have quoted above is highly relevant and is binding on this court in the determination of similar issues.

[47] Seen in the light of the authorities alluded to before (eg. *CRW Joint, Perwira Bintang Holdings, AJWA, Intelek Timur, Cairn Energy India* (CA 2009), E *Cairn Energy* (CA 2015)) taken at its highest, even it can be argued that the majority tribunal erred in law in deciding that the deed of commitments was the relevant agreement to determine liability for the fire incident and not applying cl. 13.4 of the storage agreement to limit liability to Trafigura for F the fire incident, it is beyond doubt that an error of law is not sufficient ground justifying the setting aside of an arbitral award under s. 37 of the AA 2005.

Subrogated Claim Disallowed And/Or Capped Under The Contracts

G **[48]** TLP submits that the partial award must be set aside and likewise the order for leave to enforce the partial award on the ground of the tribunal's failure to consider TLP's defence of the limitation of liability cl. 13.4 of the storage agreement. In this regard TLP submits that:

(a) [N]o damages were payable in respect of the Product Value as it was H agreed between the parties pursuant to cl. 13.2 of the Storage Agreement that Trafigura would bear the risk of loss or damage to the product by fire, and would insure itself against that risk. Trafigura had been reimbursed for the Product Value by its insurers. These claims were pursued in the arbitration as a subrogated claim on behalf of the insurers.

I (b) [A]s Trafigura brought this claim on behalf of the insurers, the insurers who step into the shoes of the insured could have no greater rights than the insured itself.

TLP cites *MacGillivray on Insurance Law* 10th edn, at p. 584 paras. 22-39 to support this proposition.

> (bb) [A]s the insured Trafigura was obligated under the Storage Agreement to bear the risk of loss or damage to the product by the fire, the insurers are therefore not entitled to recover its payments made to Trafigura, or in other words, Trafigura is not entitled to recover the quantum of the product losses from TLP.
>
> (bbb) [S]ince the insurers could have no greater rights than the insured, it is the Plaintiff's submission that the insured's claim (if at all can be brought), is capped at USD 1 million, by the limitation of liability cl. 13.4 of the Storage Agreement.

[49] In my judgment TLP's submission cannot be sustained because it is an issue that need not be considered by the tribunal given that the tribunal found liability under the deed of commitments and not the storage agreement for the reasons which I have alluded earlier. There is no similar cl. 13.2 appearing in the deed of commitments. Again taken at the highest, even if it could be argued that the majority tribunal was in error in deciding that the deed of commitments to determine liability for the fire incident and not applying cl. 13.2 of the storage agreement it does not justify the setting aside of the partial award under s. 37 of the AA 2005. Here I adopt the reasons stated in paras. 43, 44 & 46 above.

Whether The Partial Award Is Liable To Be Set Aside Under s. 37(1)(b)(ii) Read With s. 37(2)(b) As The Majority Tribunal Breached The Rules Of Natural Justice

[50] According to TLP the majority tribunal breached two rules of natural justice when it ordered TLP to pay Trafigura US$118,374,250 as damages for Trafigura's "loss of use of the facility for the minimum lifespan of the storage agreement, being a period of seven years up until 31 May 2015" (partial award para. 343(b)(iv)), namely, the *audi alteram parte*m rule and the obligation to give reasons.

[51] Before I address the merits of TLP's two complaints on alleged breaches of natural justice, I will first consider the approach of the courts towards a challenge of an arbitral award mounted on breach of rules of natural justice and for being in conflict with public policy.

[52] The case of *TCL Air Conditioner (Zhongshan) Co Ltd v. Castel Electronics Pty Ltd* [2014] FCAFC 83 common to both parties is of persuasive value. In *TCL Air Conditioner (supra)*, the appellant, TCL, a company of the People's Republic of China and the respondent, Castel, an Australian company were parties to an agreement for the distribution in Australia of air-conditioning units manufactured by TCL in China. Castel was the exclusive Australian distributor. The agreement contained an arbitration clause wherein the International Arbitration Act 1974 (C th) ('the IAA') applied.

[53] Castel complained that TCL had sold its products to third parties in Australia in breach of the exclusive distribution agreement. Castel referred its complaint to arbitration. The arbitral tribunal in that case found in favour of Castel and awarded Castel damages of $2,874,870.

[54] TCL applied to the Australian courts to set aside the award, and the resist Castel's enforcement of the arbitral award under arts. 34 and 36 of the Model Law respectively, which has the force of law in Australia by s. 6 of the IAA. The grounds asserted by TCL for setting aside of the award and the resistance of the enforcement of the award were identical: alleged failure by the arbitrators to accord TCL procedural fairness ie, a breach of natural justice in the making of the award and thus it was in conflict with the public policy of Australia (arts. 34(2)(b)(ii) and 36(1)(b)(ii) and ss. 16 and 19 of the IAA).

[55] According to TCL the alleged breaches of the rules of natural justice arose from the making by the arbitrators of three central findings of fact concerning Castel's losses which were said to have made in the absence of probative evidence and were findings which TCL was said to have been denied an opportunity to present evidence and argument.

[56] In the first instance, Justice Murphy of the General Division of the Federal Court dismissed TCL's application. On appeal, the Federal Court unanimously dismissed TCL's appeal. In so doing, the Federal Court observed as follows:

> [53] All of grounds 4 to 7 were without merit. **They involved the dressing up of complaints about the factual findings into a claim concerning asserted procedural unfairness**. The primary judge (as he himself recognised) went more deeply into the facts than was necessary for the proper and efficient resolution of the matter. That is not said by way of criticism of the primary judge, who undertook a careful, and correct, analysis of the facts. Rather, it is said to make clear that *nothing in the IAA is likely to permit a party to an arbitration award to spend three days before a judge arguing about the factual findings made by experienced arbitrators after a ten-day hearing, when the substance of the complaint is the evidential foundation for, and reasoning process towards, facts as found*.
>
> [After a detailed and extensive discussion of the position in Hong Kong, New Zealand and Singapore, the Federal Court went on to observe as follows:]
>
> [105] A number of matters can be said arising out of the above cases and discussion. First, the above cases deal with the exercise of public or state power. **The context of international commercial arbitration is the exercise of private power through an arrangement and a tribunal to which the parties have consented under a regime wherein errors of fact or law are not legitimate bases for curial intervention**.
>
> …

> [113] **In most, if not all, cases a party who says that it has suffered such unfairness or practical injustice should be able to demonstrate that without the kind of detailed re-examination of the facts that occurred in this case**. Applications involving review, enforcement and recognition under Arts 34, 35 and Art 36 (or Art V of the New York Convention) **should not be permitted to be used (or hijacked) to undertake, in substance, a rehearing of factual or legal reasoning under the guise of a complaint about a breach of the rules of natural justice based on the "no evidence rule**". Unfairness or practical injustice in the conduct of international commercial arbitration should, if it exists, be able to be expressed shortly and, likewise, demonstrated tolerably shortly. It will not be demonstrated as a result of a detailed factual analysis of evidence regularly and fairly brought forward involving asserted conclusions of facts different to those reached by the arbitrator …
>
> (emphasis added)

[57] From the cases reviewed, it is clear that in applications to set aside arbitral awards or to resist the enforcement of the award on ground of non-compliance with rules of natural justice, the court must be mindful of and guard against using the alleged breach of natural justice as a "disguised attack" on or "used (or hijacked)" the arbitral tribunal's factual or legal reasoning (*TCL Air Conditioner* at [113]; "reinventing of (a client's) case with the benefit of hindsight in the guise of a challenge based on alleged breach of natural justice" (*BLC and Others (supra)* at 82[3] & 84[4]; *Cairn Energy India* at 808 [22] "Generally, to reopen or re-examine the merits of the case and in effect determine and replace, the findings of the majority arbitrators." referred to in *Infineon*.

[58] It is undisputed under s. 37(1)(b) read with s. 37(2)(b)(i) & (ii) of the AA 2005, a breach of the rules of natural justice which constitutes a ground of setting aside an award is expressed as one where the award is in conflict with the public policy of Malaysia.

[59] TLP submits that the effect of s. 37(2)(b) of the AA 2005 is that a breach of natural justice is, *ipso facto*, a breach of public policy and in support of this proposition cites:

(a) *Castel Electronics Pty Ltd v. TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 at [29]:

> I consider that the plain words of s.19(b) unambiguously declare that if any breach of natural justice occurs in connection with the making of an award then, for the purposes of arts 34 and 36, the award is in conflict with or contrary to the public policy of Australia.
>
> (this statement was highlighted by TLP's Counsel); and

(b) *Ironsands Investments Ltd v. Toward Industries Ltd* (CIV-2010-404-004879 (8 July 2011) at [19]-[20]:

> [19] I consider that the clear and unambiguous meaning of Article 34(6) is that a breach of natural justice, in itself, constitutes a conflict with the public policy of New Zealand for the purposes of Article 34(2).
>
> (this statement was highlighted by TLP's Counsel)

[60] However with respect I find it is otherwise if the whole of the paragraphs are read in its entirety as illustrated below:

Castel Electronics at *[29]*

[61] It is observed below that the words immediately preceding and immediately after the highlighted statement relied on by TLP shows the proposition made by TLP it is not entirely accurate:

> Although this interpretation might be said to lead to inconsistency with international decisions on the meaning of "public policy"…. Although I should as far as possible construe the IAA consistently with international understanding of the Convention …

Ironsands Investments at *[19]-[20]*

[62] It is observed the following statements quoted below found in the very same paragraphs which TLP relied on shows that the proposition based on the highlighted statement relied on by TLP is not entirely accurate:

> [19] … I note that the commentators on the Arbitration Act (Green & Hunt on Arbitration Law and Practice) suggest a similar approach, concluding that, while some breaches of the rules of natural justice will fall within the statutory grounds, not every breach will result in a finding that the award is in conflict with the public policy of New Zealand. However, there is no authority cited for that proposition.
>
> [20] It would, of course, be very unsatisfactory if the effect of Article 34(6) inevitably resulted in arbitral awards being set aside for what might, in the relevant context, be quite minor breaches of natural justice or breaches that have no effect on the eventual outcome. However, in practical terms this is unlikely to happen because of the Court's discretion under Article 34 to set aside an award. It is unlikely that the Court would exercise its discretion to set aside an arbitral award where the relevant breach of natural justice is minor and could have had no bearing on the outcome.

[63] Hence with respect I am of the view from that not all breaches of the rules of natural justice will *ipso facto* mean that the arbitral award will be in conflict with public policy and will be liable to be set aside under s. 37(1)(b)(ii) of the AA 2005. This can be gleaned from a reading of the following cases:

(a) In *Infineon*, I agree with the view expressed by Mohamad Arif J (as he then was) that the approach in the refusal to register on the ground of conflict of public policy unless it offends the most basic notion of

morality and justice is very restrictive being grounded in the upholding of international comity. The learned judge cited two leading views taken on the issue of public policy in the area of arbitration law, where at [72] His Lordship referred to the *dicta* of Bokhary PJ in *Hebei Import & Export Corp v. Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111 and to the *dicta* of Judith Prakash J at [73] in *Aloe Vera of America Inc v. Asianic (S) Pte Ltd And Another* [2006] 3 SLR 174.

(b) In the *Laos's* case where Lee Swee Seng JC (as he then was) 422 [29] referred to the *dicta* of the Singapore Court of Appeal in *PT Asuransi* at [59] which is endorsed by the Court of Appeal at [12] in *MTM Millenium*:

> 59 Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would 'shock the conscience' (see Downer Connect ([58]) (at [136]), or is 'clearly injurious to the public good or … **wholly offensive to the ordinary reasonable and fully informed member of the public**' (see *Deutsche Schachbau v. Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246 at p 254, per Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see *Parsons & Whittermore Overseas Co Inc v. Societe Generate de L'Industrie du Papier (RAKTA)* 1974 508 F 2d 969 (2nd Cir) at p 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at p. 914):
>
> In discussing the term 'public policy', it was understood that it was not equivalent to the political stance or international policies of a State but comprised the **fundamental notions and principles of justice** … It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. (emphasis added)

[64] Even if it can be shown that there has been a breach of natural justice, the court retains the discretion whether to set aside the arbitral award for being in conflict with public policy under s. 37(1)(b)(ii) of the AA 2005 as can be seen from the following cases:

(a) *Castel Electronics (supra)* at [34] where Murphy J stated:

> Insofar as setting aside an award is concerned, the proper exercise of my discretion requires that … I must have regard to the fact that arbitration is intended to be an efficient, enforceable and timely method of resolving commercial disputes, and that arbitral awards are intended to provide certainty and finality. These considerations indicate that the discretion to set aside an award or to refuse enforcement because an award is in conflict with or contrary to public policy, should be sparingly applied. If not, the certainty and finality of awards and the facilitation of award enforcement may be undermined.;

(b) *Ironsands Investments* as per para. 60 above;

(c) *AJWA* where Ramly JCA (as he then was) at 404 [13] opined:

> [13] Section 37(1) of the Arbitration Act 2005 provides for the various grounds on which an arbitral award may be set aside. The onus is on the party making the application to provide proof. The court's discretion in setting aside arbitral award is now limited to the narrowly defined circumstances in line with the modern international arbitral practice. The effect of the present ss. 8, 9, 37 and 42 of the Arbitration Act 2005 is that the court should be slow in interfering with an arbitral award. The court should be restrained from interference unless it is a case of patent injustice which the law permits in clear terms to intervene. Once parties have agreed to arbitration they must be prepared to be bound by the decision of the arbitrator and refrain from approaching the court to set it aside. Constant interference of the court as was the case in the past will defeat the spirit of the Arbitration Act 2005 which is for all intent and purpose to promote one-stop adjudication in line with the international practice.; and

(d) *Cairn Energy* at 182 [120], which has been affirmed by the Court of Appeal in *Cairn Energy* (CA 2015).

[65] This brings me to the point that the threshold required before a court will exercise its discretion to set aside an arbitral award for being in conflict with public policy is a high one ie, it is widely accepted that the definition of public policy ought to be a restrictive one:

(a) In *TCL Air Conditioner* where the Federal Court of Australia held at [74] that "[T]he phrase "public policy" so as to understand the statutory context of the phrase "rules of natural justice" [was] understood to be limited to the fundamental principles of justice and morality conformable, and suited to operation within, the international nature of subject matter - international commercial arbitration, a context very different from the review of public power in administrative law;

(b) In *PT Asuransi* where the narrow definition of public policy was adopted by the Court of Appeal in *MTM Millenium* as alluded in para. 63(b) above.

[66] In *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR 86, the appellant Soh Beng Tee (SBT) was employed by the respondent, Fairmount as a main contractor to construct a condominium to which the parties entered a formal contract. Fairmount terminated SBT's employment. The matter was arbitrated; the arbitrator ruled in favour of SBT. In the High Court, Fairmount appealed on jurisdiction issue and on breach of natural justice issue. The trial judge found there had been a breach of Fairmount's right to be heard in that:

> Fairmount argued in the High Court that (i) the Arbitrator's decision to set time at large rather than determine the reasonable extension of time that SBT was entitled to ("the Disputed Issue") had not been submitted for arbitration and therefore the decision ran foul of s. 48(1)(a)(iv) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") ("the jurisdiction issue"); (ii) Fairmount was deprived of putting forward a case against setting time at large, in breach of its right to be heard and contrary to s. 48(1)(a)(vii) of the Act ("the natural justice issue"]).

[67] However at the Court of Appeal, the appeal of SBT was confined to the breach of natural justice issue wherein Fairmount alleged that it was deprived of putting forward a case against setting time at large, in breach of the right to be heard and contrary to s. 48(1)(a)(vii) of the Arbitration Act (Cap 10, 2002 Rev Ed) which reads:

> 48(1) An award may be set aside by the Court:
>
> (a) If the party who applies to the Court to set aside the award proves to the satisfaction of the Court that:
>
> ...
>
> (vii) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced …

[68] The Singapore Court of Appeal allowed the appeal and found in favour of SBT adopting the approach of (i) the breach complained of occur "in connection with the making of the award" ie, even if there had been a breach of natural justice, a casual nexus must be established between the breach and the award made" and (ii) the breach of natural justice must prejudice the rights of the aggrieved party before the court may intervene. This is evident from the legal reasoning at 131 [96] to 132 [97-98] which is quoted *in extenso*:

> 96. … The main question in this appeal is whether Fairmount had indeed been taken by surprise as claimed, and whether any prejudice had been suffered as a result. In our view, Fairmount has not shown why it was caught unawares by the finding that time was at large. In fact, as our analysis amply demonstrates, the Disputed Issue was not only alluded to in SBT's pleadings, and later argued (though not emphasised) during the arbitration, but it was also further expounded upon in SBT's written submissions, as directed by the Arbitrator. In any event, we hold that the Arbitrator was fully entitled to extract an alternative position (that time

was at large as of March 1998) from the submissions of Fairmount and SBT (whether SBT was or was not entitled to an extension of time under the SIA Conditions) especially since the building blocks of the Arbitrator's decision (ie, that Fairmount had committed acts of prevention) were already "in the arena". Furthermore, as explained, the Disputed Issue was simply another reflection of whether SBT was entitled to an extension of time under the SIA Conditions, a point that had already been explored and vigorously contested. Indeed, given that the trial judge had found that the Disputed Issue was not outside the scope of submissions and that a finding apropos the Disputed Issue was not beyond the contemplation of the parties (Fairmount did not challenge this part of the trial judge's decision), it stands to reason that the Arbitrator had not surprised the parties by his decision to set time at large as of March 1998.

97. Even if we were to accept Fairmount's position that there had been a breach of the rules of natural justice, we find that there was no causal nexus between the breach and the Award. The Arbitrator had clearly decided in favour of SBT on other premises that were cogently founded on both lucid and logical grounds. Moreover, we find that any purported breach of the rules of natural justice failed to prejudice Fairmount to any significant extent because, for the reasons explored above, the same result would have been obtained in any event, even if the Arbitrator was not in breach of the rules of natural justice, as indeed we have found he was not.

98 As a matter of both principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process in order to promote the two primary objectives of the Act; namely, seeking to respect and preserve party autonomy and to ensure procedural fairness. Fairness includes the right to be heard and mandates equality of treatment. Arid, hollow, technical or procedural objections that do not prejudice any party should never be countenanced. *It is only where the alleged breach of natural justice has surpassed the boundaries of legitimate expectation and propriety, culminating in actual prejudice to a party, that a remedy can or should be made available.*

(emphasis added)

[69] In *Chain Cycle Sdn Bhd v. Government of Malaysia* [2014] 10 CLJ 196 where Azizul Azmi Adnan JC at 227 [112] stated:

For the court to intervene under s. 37(1)(b) of the Arbitration Act 2005, the plaintiff must show that it had suffered prejudice by the actions of the arbitrator. The correct proposition is not that "any denial of natural justice is a prejudice", but rather that there must be prejudice for there to be a breach of natural justice.

[70] I am mindful that the phrase "by which the rights of any party have been prejudiced" found in s. 48(1)(a)(vii) of the Arbitration Act (Cap 10, 2002 Rev Ed) is not present in s. 37(1)(b)(ii), s. 37(2)(b)(ii) of the AA 2005. However with respect that the approach in *Soh Beng Tee* is instructive for the determination of a breach premised on s. 37(2)(b)(ii) of the AA 2005.

[71] Hence it is my respectful view in order to set the arbitral award for being in conflict with public policy, it must be shown that the alleged breach of natural justice has caused actual prejudice to the aggrieved party.

[72] Returning to the mainstream, summarily TLP argues that:

(a) In making the Partial Award, the Majority Tribunal was obliged to:

(i) Consider and decide the central defences raised by TLP:

Authority: *Front Row Investment Holdings (Singapore) Pte Ltd v. Daimler South East Asia Pte Ltd* [2010] SGHC 80, *Soeximex v. Agrocorp International* [2012] 1 Lloyd's Rep 52, *Official Assignee v. Chartered Industries of Singapore Ltd* [1978] 2 MLJ 99.

(ii) Give reasons for its decision to reject TLP's defences:

Authority: *Mark John Jerling v. Moss Brothers Limited* [2013] NZHC 2893, MS *Som Datt Builders Ltd v. State of Kerala* 2009 (4) R.A.J. 304 (SC), *Oil Basins Limited v. BHP Billiton* [2007] VSCA 225.

The central defences raised by TLP in the arbitration were:

(a) Whether any liability of TLP was limited to USD 1 million by clause 13.4 of the Storage Agreement: Agreed Issue No. 9; and

(b) Whether the continued operations of the Facility broke the chain of causation such that the proximate cause of the Fire Incident was the continued operation of the Facility, and not the defects in design and/or construction of the Facility: Agreed Issue No. 6, 7 & 8.

However, the Majority Tribunal breached its obligations in that:

A. In Respect of Partial Award paragraph 343(b)(iv)

(i) The Majority Tribunal awarded USD 118 million under the Storage Agreement;

(ii) However, it failed to consider and decide whether this liability was limited to USD 1 million by clause 13.4 of the Storage Agreement: Agreed Issue No. 9;

(iii) It failed to give any reasons for not finding that this liability was limited to USD 1 million by clause 13.4 of the Storage Agreement: Agreed Issue No. 9.

B. In Respect of Partial Award paragraph 343(b)(i), (ii) and (iv)

(i) it failed to consider and decide whether the Fire Incident was caused by the continued operation of the Facility after the discovery of the damaged IFR;

(ii) it failed to give any reasons why it did not find that the Fire Incident was caused by the continued operation of the Facility.

TLP has been greatly prejudiced by these failures in that:

(a) Had the Majority Tribunal considered and decided the issue of whether the damages ordered in paragraph 343(b)(iv) of the Partial Award were limited by clause 13.4 of the Storage Agreement, it may have ruled in favour of TLP, as did the Minority Tribunal;

(b) Had the Majority Tribunal considered and decided the issue of whether the Fire Incident was caused by the continued operation of the Facility after discovery of the damaged IFR, it may have held that the relevant contract was the Storage Agreement and found that damages were limited by clause 13.4 of the Storage Agreement.

[73] With respect I find the arguments of TLP as submitted above cannot be sustained for the following reasons.

Whether The Majority Tribunal Breached The Audi Alteram Partem Rule

[74] There is no need for the majority tribunal to consider TLP's defence that its liability to pay damages for breach of its obligations under the storage agreement was limited by cl. 13.4 of the storage agreement as:

(a) [T]he Majority Tribunal's award of damages was given under the Deed of Commitments for the defects in the design and construction of the Facility which caused the Fire Incident. The Majority Tribunal's award of damages was neither given under the Storage Agreement nor for TLP's breaches of or failure to perform its obligations under the Storage Agreement.

(b) It is clear from the Partial Award that the Majority Tribunal made no finding as to whether TLP breached or failed to perform its obligations under the Storage Agreement as this issue simply did not fail to be determined after liability had been found against TLP under the Deed of Commitments.

(c) Therefore, the question of whether TLP's liability to pay damages for breach of its obligations under the Storage Agreement was limited by Clause 13.4 of the Storage Agreement did not even arise and there was no need for the Majority Tribunal to consider or decide on the same.

In this regard I adopt what I have alluded to in paras. 27 - 31 above.

[75] The cases of *Soeximex Sas v. Agrocorp International Pte Ltd* [2012] 1 Lloyd's Rep 52 and *Official Assignee v. Chartered Industries of Singapore Ltd* [1978] 1 LNS 134 do not assist TLP's argument. Unlike the arbitral tribunals in the two cases, I find the majority tribunal in the present case did consider and decide on all central issues in the arbitration including the central defences raised by TLP as follows:

(a) First, the Majority Tribunal's award of damages was given in respect of TLP's liability to Trafigura for the defects in the design and construction of the Facility which caused the Fire Incident; this liability arose under the Deed of Commitments. In other words, the Majority Tribunal's award of damages was given under the Deed of Commitments and not the Storage Agreement (Partial Award 132 to 152, 188 to 227 and 235).

In this regard, the Majority Tribunal (rightfully) found that cl.13.4 of the Storage Agreement does not operate to limit TLP's liability to Trafigura under the Deed of Commitments (Partial Award at 229 to 234).

(b) Given this, it was plainly not necessary for the Majority Tribunal to go on to consider or decide whether TLP was liable to Trafigura under the Storage Agreement, and whether cl.13.4 of the Storage Agreement operates to limit such liability (Partial Award at para 228).

(c) Second, the Majority Tribunal found that the continued operation of the Tank neither caused nor contributed to the Fire Incident (Partial Award at paras 132 to 152).

[76] As for TLP's argument that the majority tribunal's award of damages for Trafigura's loss of use of the facility must have been under the storage agreement as the expectation to use the facility arose only under the storage agreement; I have held that this argument is without merit and in this regard I adopt all I have addressed and stated in paras. 32-37 above.

[77] In any event in following the approach in *Soh Beng Tee*, taking it to the highest and even if it could be argued that the majority tribunal did not comply with the rules of natural justice in failing to consider TLP's defence under cl. 13.4 of the storage agreement, in my respectful view this is not a breach which has caused actual prejudice or "shock the conscience" or offends "fundamental principles of justice and morality." (See *MTM Millenium, PT Asuransi*). In this connection I am incline to accept the reasons submitted by Trafigura as follows:

[I]t is by no means certain that the Majority Tribunal would have found that TLP's liability was limited by cl.13.4 of the Storage Agreement given that in the course of the arbitration Trafigura presented extensive submissions in its alternative case for breach of the Storage Agreement that Clause 13.4 **did not** operate to limit TLP's liability to Trafigura under the Storage Agreement given the other provisions in the contract and the factual matrix of the case … In particular it was pointed out to the Tribunal that cl. 13.4 was materially inconsistent with Clause 14.2 of the Storage Agreement which provided that:

> Each party must at all times after the date of this Agreement **indemnify** the other party and keep the other party **indemnified** in relation to all losses, damages, costs and expenses, claims demands, actions or suits suffered or incurred by or made or instituted against the other party as a result, directly or indirectly, of a breach by the first party of its obligations under this Agreement. (emphasis added).

Whether The Majority Tribunal Breached Its Obligation To Give Reasons

[78] It was held by the Court of Appeal in *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah And Anor & Another Appeal* [1998] 3 CLJ 85; [1998] 3 MLJ 289 at 311 [I] - 312 [A-B] following the Privy Council case of *B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962]

A 1 LNS 14; [1962] MLJ 169 at 172 that *nemo judex in causa sua* (rule against bias) and *audi alteram partem* (the right to be heard) comprise the twin pillars of the rules of natural justice. Thus it is evident that since the duty to give reasons is not part of the rules of natural justice, it is my respectful view that it is not a ground on which an arbitral award may be set aside under
B s. 37(1)(b)(ii) read with s. 37(2)(b) of the AA 2005 (See also *Haji Ali Haji Othman v. Telekom Malaysia Bhd* [2003] 3 CLJ 310; [2003] 3 MLJ 29 at 32 [D-E]).

[79] Be that as it may, Dato' Nitin in submission states "s. 33(3) of the Arbitration Act 2005, and art. 34 UNCITRAL Rules expressly require that
C any award must be reasoned. The right to set aside an award for failure to comply with this requirement is settled law". Learned counsel cites the Australian case of *Oil Basins Ltd v. BHP Billiton Ltd & Ors* [2007] VSCA 225 at [50] to [54] in particular [50] and [54] as follows:

> [50] the requirement is for reasons sufficient to indicate to the parties why
D the arbitrator has reached the conclusion to which he or she has come … it is necessary that an arbitrator deal with issues raised and indicate the evidence upon which he or she has come to his or her conclusion; and
>
> [54] … the arbitrators' decision in the present case called for reasons of a judicial standard. As with reasons which a judge is required to give, the
E extent to which an arbitrator needs to go in explaining his or her decision depends on the nature of the decision.

[80] It is significant to note the statement in para. 34 of *Oil Basins* that "As with reasons which a judge is required to give, the extent to which an arbitrator needs to go in explaining his or her decision depends on the nature
F of the decision."

[81] In the Indian case of *Som Datt Builders Ltd v. State of Kerala* [2009] INSC 1600, the Supreme Court of India at 310 [25]:

> 25. The requirement of reasons in support of the award under
G Section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the arbitral tribunal. *It is true that arbitral tribunal is not expected to write judgment like a court nor it is expected to give elaborate and detailed reasons in support of its finding/s but mere noticing the submissions of the parties or reference to documents is no substitute for reasons which the arbitral tribunal is obliged to give.* Howsoever brief these may be, reasons
H must be indicated in the award as that would reflect thought process leading to a particular conclusion. To satisfy the requirement of Section 31(3), the reasons must be stated by the arbitral tribunal upon which the award is based; want of reasons would make such award legally flawed.
>
> (emphasis added)

I **[82]** It is not disputed that the exceptions for the non giving of reasons for an award in s. 33(3)(a) or (b) of the AA 2005 does not apply in the present case. Whilst it is true that s. 33(3) of the AA 2005 provides that an award

shall state the reasons upon which it is based, in *Som Datt* it is stated the extent of the judgment required of the arbitrator is as reflected in the statement emboldened in para. 81 above.

[83] In the case of *TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd* [2013] SGHC 186 Chan Seng On J at 1012 [100] followed the case of *World Trade Corporation v. C Czarnikow Sugar Ltd* [2005] 1 Lloyd's Rep 422 where an issue arose as to whether the arbitral tribunal dealt with the arguments and evidence adequately; It was held by Coleman J at [8] and [9], *inter alia*:

> 8. … [Arbitrators] are under no duty to deal with every possible argument on the facts and to explain why they attach more weight to some evidence than to other evidence.
>
> 9. [I]t is clear that arbitrators are not in general required to set out in their reasons an explanation for each step taken by them in arriving at their evaluation of the evidence and in particular for their attaching more weight to some evidence than to other evidence or for attaching no weight at all to such other evidence.

[84] Further in *TMM Division (supra)*, the Singapore High Court referred to the Singapore Court of Appeal's decision of *Thong Ah Fat v. PP* [2012] 1 SLR 676 and held that the following are clear:

> (a) The standard of explanation required in every case must correspond to the requirements of the case. Costs and delays are relevant factors to consider when determining the extent to which reasons and explanations are to be set out in detail: at [29]-[30].
>
> (b) In "very clear cases" with specific and straightforward factual or legal issues, the court may even dispense with reasons. Its conclusion will be sufficient because the reasons behind the conclusion are a matter of necessary inference: at [32].
>
> (c) Decisions or findings which do not bear directly on the substance of the dispute or affect the final resolution of the parties' rights may not require detailed reasoning. As a rule of thumb, the more profound the consequences of a specific decision, the greater the necessity for detailed reasoning: at [33].
>
> (d) There should be a summary of all the key relevant evidence but not all the detailed evidence needs to be referred to: at [34].
>
> (e) The parties' opposing stance and the judge's findings of fact on the material issues should be set out. However, the judge does not have to make an explicit ruling on each and every factual issue: at [35]-[36].
>
> (f) The decision should demonstrate an examination of the relevant evidence and the facts found with a view to explaining the final outcome on each material issue: at [36].

[85] Further at 1013 [104], the learned judge stated:

> 104 Even if some of an arbitral tribunal's conclusions are bereft of reasons, that is not necessarily fatal. There are a variety reasons why an arbitral tribunal may elect not to say something. **In my view, the crux is whether the contents of the arbitral award taken as a whole inform the parties of the bases on which the arbitral tribunal reached its decision on the material or essential issues**.
>
> (emphasis added)

[86] As to the meaning of what constitutes essential, at 1003 [74], the learned judge held:

> 74. This is not easy to define. Notwithstanding, in my view, arbitral tribunals must be given fair latitude in determining what is essential and what is not. An arbitral tribunal has the prerogative and must be entitled to take the view that the dispute before it may be disposed of without further consideration of certain issues. A court may take a contrary view *ex post facto*, but it should not be too ready to intervene.

I agree with all of the above views expressed by the learned judge.

[87] Applying the principles which can be gleaned from *TMM Division* which is of persuasive value, it cannot be gainsaid that when the partial award is 'taken as a whole', it more than adequately "informs the parties of the bases on which the (majority tribunal) reached its decision" on the award of damages for Trafigura's loss of use of the facility.

[88] In any event, in my judgment, the majority tribunal did in fact give detailed reasons as to why damages were payable for the loss of the use of the facility for the minimum lifespan of the storage agreement. The majority tribunal's reasons thereof can be found under the heading of "claim for loss of use of the facility (issue 10(c)) from paras. 156 to 288, partial award. To avoid repetition I shall adopt what I have alluded to in paras. 32 -36 above.

[89] For the above reasons, I am of the view that there is no basis to say that the majority tribunal has breached its obligation to give reasons and which warrant the award to be set aside under s. 37(1)(b)(ii), s. 37(2)(b)(ii) and s. 39(1)(b)(ii) of the AA 2005, on the ground that the partial award is in conflict with the public policy of Malaysia.

Whether The Majority Tribunal Breached The Rules Of Natural Justice In Awarding Damages To Trafigura For Product Value And Incidental Cost

[90] TLP argues that the majority tribunal breached the rules of natural justice in awarding damages to Trafigura for product value and incidental cost as the majority tribunal failed to consider whether the chain of causation had been broken by "TLP's operational errors, and in particular the decision by TLP to continue operating a defective facility for a whole month without properly inerting the tanks after discovery of the damaged IFR".

[91] With respect I find there is no merit in the aforesaid argument of TLP and I find the majority tribunal did not breach the rules of natural justice in awarding damages to Trafigura for product value and incident cost. I agree with the reasons submitted by Trafigura as follows:

(i) First, the majority tribunal did consider and dismiss TLP's argument that the chain of causation had been broken by "TLP's operational errors", as it found in the partial award that:

> (a) The continued operation of the Facility after the discovery of the damage to the IFRs in Tanks No. 1 and 5 neither caused nor contributed to the Fire Incident. Specifically, there is no evidence that the continued operation of the Facility aggravated the damage to the IFR, the accumulation of flammable vapour in the ullage of Tank No.1 or the ignition of this flammable vapour (Partial Award at paras 136, 146 to 148).
>
> (b) More significantly, the Majority Tribunal held that: (Partial Award at para 150).
>
> > On the Tribunal's view of the evidence, **the risk of fire or explosion originated and stemmed fundamentally** from the fact that **the defects in the design and construction of the Facility** damaged and displaced the IFR in Tank 1 and caused highly flammable gasoline vapour to accumulate in the ullage of the tank. (emphasis added)
>
> (c) Whilst the Majority Tribunal found that if Tank No.1 had been properly inerted, there would have been no risk of fire or explosion, the Majority Tribunal immediately went on to conclude again that "defects in the design and construction of the Facility were the immediate and proximate cause of the Fire Incident." (Partial Award at paras 151 to 152).

(ii) Second, in the arbitration below, TLP had never seriously pursued the argument that its own operational errors broke the chain of causation in the arbitration proceedings;

(iii) In any event I am of the view that TLP's argument that its own operational errors broke the chain of causation is unsustainable in law because the chain of causation can only be broken by some event extraneous to its own conduct. I draw support from *Halsbury's Laws of England* (vol. 29 (2014)) which states:

> Breaks in the chain of causation: *novus actus interveniens*.
>
> A subsequent extraneous event occurring after the defendant's wrongful act may have the effect of preventing any loss, or any further loss, being regarded as accruing from the defendant's wrong, in which case the chain of causation can be said to be broken. … The extraneous event concerned may be an act of nature, an act of some third party or an act by the claimant himself.

[92] In addition, TLP cannot take advantage of its own wrongdoing as held by the Court of Appeal in the case of *Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31 at 39 [8] the "[s]ettled authority has held that a party cannot rely on its wrong to defeat its opponent's claim."

[93] In any event taking it to the highest that even if the majority tribunal should have but did not consider TLP's argument that the chain of causation had been broken by "TLP's operational errors", I am of the view that it does not mean that the partial award is in conflict with public policy and is liable to be set aside under s. 37(1)(b)(ii) of the AA 2005. My reasons are these.

(i) Applying the test that the court will only set aside an arbitral award for being in conflict with public policy if there is a breach of natural justice which has caused actual injustice and which "shock the conscience" and offends "fundamental principles of justice and morality" as alluded to before, it is my respectful view that this is not the situation in the instant case; and

(ii) Further it is not certain that even if the majority tribunal had considered TLP's argument, it would have found in favour of TLP for the reasons which Trafigura submits:

> (a) First, having found that "defects in the design and construction of the Facility were the immediate and proximate cause of the Fire Incident" ((Partial Award at para 152), it is more likely than not that the Tribunal would have rejected TLP's argument.
>
> (b) Second, and as argued by Trafigura in the arbitration below, TLP's argument seeks to rely on its own wrong as breaking the chain of causation.
>
> (c) In this regard, it is trite that a defendant is not allowed to rely on his own subsequent wrong as a break in the chain of causation. This is wholly consistent with the well-established principle under Malaysian law that a party ought not to be allowed to rely on or take advantage of its own wrong to defeat an opponent's claim.
>
> (d) As TLP's argument is legally unsound, it is therefore more likely than not that the Tribunal would have rejected the argument.

[94] TLP cites *Mark John Jerling v. Moss Brothers Limited* [2013] NZHC 2893 for the proposition that it is a rule of natural justice that an arbitral tribunal is obliged to give reasons for its decisions. TLP argues that in awarding damages to Trafigura, the majority tribunal had purportedly failed to give any reason for not finding in favour of TLP on the two central defences that it had raised warranting the award of damages made by the majority tribunal liable to be set aside for being in breach of the rules of natural justice.

[95] With respect I am of the view the case of *Mark John Jerling* does not assist TLP's case because unlike the arbitral tribunal in *Mark John Jerling*, the majority tribunal did give reasons for rejecting the two central defences relied on by TLP. In this regard I adopt what I have stated at paras. 56-74 and 88-90 above. (See partial award at paras. 132-152, 188-227 and 229-234).

Conclusion

[96] For all the reasons given above I had dismissed TLP's applications in encl. 1 (OS 13) and encl. 8 (OS 18) with costs of RM150,000 being costs of RM100,000 for encl. 1 and RM50,000 for encl. 8.